TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1926

No. [redacted] 261

TYSON AND BROTHER—UNITED THEATRE TICKET OFFICES, INC., APPELLANT,

vs.

JOAB H. BANTON, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, STATE OF NEW YORK, AND VINCENT B. MURPHY, AS COMPTROLLER OF THE STATE OF NEW YORK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JANUARY 6, 1926

(31,503)

(31,593)

SUPREME COURT OF THE UNITED STATES

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Third. This action is a suit in equity and arises under the Constitution and laws of the United States, as will hereafter more particularly appear. Among other things, this suit is brought to repress annd prevent the deprivation, under color of a certain statute of the State of New York, of certain rights and immunities secured to the plaintiff by the Constitution of the United States, that is, a right to have and enjoy its property without being deprived thereof without due process of law and without being denied the equal protection of the law and a right to enjoy its liberty without being deprived thereof without due process of law and without being denied the equal protection of the law, and this suit, among other things, involves the question as to whether or not the plaintiff may resell or engage in the business of reselling any tickets of admission, or any other evidence of right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held, and exact or receive a price for any such tickets or evidences of the right of entry in excess of fifty cents (50¢) in advance of the price printed on the face of such ticket or other evidence of the right of entry, and whether said statute, if it prevents the resale of such ticket or evidence of the right of entry in excess of fifty cents (50¢) in advance of the price printed on the face thereof, is not contrary to the Constitution of the United States, and whether or not the defendants, in threatening to enforce the pro-
[fol. 4] visions of said statute against the plaintiff, its officers and agents, are not depriving plaintiff of its property and its right to engage in business without due process of law and whether they are not denying plaintiff the equal protection of the law.

This suit is brought to repress and prevent the defendants from proceeding under and by virtue of the provisions of the statute of the State of New York, hereinafter referred to, from illegally and unlawfully threatening complainant, its officers and agents, with fine, arrest, imprisonment, penalty and forfeiture under the color of said statute.

Fourth. Plaintiff is now and for a number of years last past has been a corporation duly organized and existing under and by virtue of the laws of the State of New York and engaged in the business of reselling tickets of admis-

sion or other evidences of the right of entry to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held.

Plaintiff's said business is a lawful one and the pursuit thereof cannot be prohibited directly or indirectly. It consists of the sale of theatre tickets which constitute property and the performance of personal services for its customers. Plaintiff performs a useful service for its customers by saving them the time and cost of going to box offices, which are usually at a great distance from their homes, and standing in line at box offices.

[fol. 5] Fifth. In the conduct of its business plaintiff maintains an office for the sale of tickets of admission and other evidences of the right of entry to theatres and places of amusement, in the heart of the theatrical district of the City of New York, under a lease expiring May 1st, 1940, and obligating plaintiff to pay an annual rental of $24,000. Plaintiff has many thousands of customers, over five thousand of whom have charge accounts and who pay monthly for the tickets which they purchase. For the convenience of its customers plaintiff maintains thirty-one telephones and, in addition thereto, fifty-five private wires communicating directly with various theatrical box offices in the City of New York; the average cost to the plaintiff for the last three years for this telephone service has been about $5,400 per annum.

Plaintiff employs fifteen salesmen to wait upon customers. None of these salesmen solicits trade upon the streets but they make sales solely over the counter and by telephone. The average salaries paid by the plaintiff to salesmen for the last three years has been about $6,350 per annum. Plaintiff also employs ten messenger boys to deliver tickets to the homes, offices or any other place convenient to its customers at an average cost of $5,200 per annum. Plaintiff employs a cashier at a salary of about $2,280 per annum, a porter for a salary of $1,200 per annum, and five bookkeepers to keep account of the tickets purchased and sold by the plaintiff and the charge accounts of its customers, and whose salaries average $10,300 per annum. In addition to other miscellaneous expenses plaintiff annually incurs an expense exceeding $1,500 for carfares in the delivery of tickets to patrons.

For the five years last past plaintiff has sold an average of approximately three hundred thousand (300,000) tickets [fol. 6] per annum. These tickets are sometimes obtained directly from the box office; sometimes from other brokers and distributers.

Approximately one-half of the tickets dealt in by the plaintiff are subscribed for before the performance has opened and frequently before the same has been casted. Such tickets must be paid for two weeks in advance. In 1923 plaintiff subscribed for and paid in advance of the opening of various productions 140,500 tickets for which it paid the sum of $540,750.50. In 1924 plaintiff subscribed and paid for in advance of the opening of various productions 127,752 tickets for which it paid the sum of $491,-604.15. From January 1st to July 1st, 1925, plaintiff subscribed and paid for in advance of the opening of various productions 81,924 tickets for which it paid the sum of $315,510. Other tickets are received from box offices on consignment and must be returned by plaintiff by 1:30 for matinees and 7:30 for evening performances. A substantial number of these tickets and of the tickets subscribed for in advance of the production remain in the hands of the plaintiff and are a total loss. Theatres allow a return of tickets subscribed for to the extent of 10 to 25 per cent. thereof. During the last three years plaintiff's loss on such unsold tickets has averaged 18,230 tickets or the sum of $70,210.

At times customers demand tickets which the plaintiff does not possess and cannot obtain from box offices and, with the consent of the customers, it obtains the same from other brokers and distributers and must pay therefor a price in excess of the sum printed upon the face of the ticket.

Plaintiff's business exceeds $1,500,000 per annum of which less than fifty per cent. represents cash sales, the balance being charged to customers. In order to finance [fol. 7] plaintiff's business plaintiff must annually borrow large sums of money amounting in certain years to $75,000 upon which sums plaintiff is compelled to pay interest.

Sixth. In 1922 the Legislature of the State of New York, by Chapter 590 of the Laws of 1922, amended the General Business Law of the State of New York, by adding thereto

Sections 167 to 174 inclusive, a copy of which statute is annexed hereto marked Exhibit A and made a part hereof.

Seventh. Pursuant to Section 168 of the General Business Law of the State of New York, as adopted by Chapter 590 of the Laws of 1922, plaintiff paid to the Comptroller of the States of New York a license fee of $100 under protest, a copy of which is annexed hereto and marked Exhibit D and made a part hereof, and having fully complied with the provisions of said statute, on the 1st day of January, 1925, procured from the Comptroller of the State of New York a license to resell or engage in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held, and to conduct said business subject to all the conditions of said statute, a copy of which license is annexed hereto marked Exhibit B and made a part hereof.

Eighth. Pursuant to Section 169 of the General Business Law of the State of New York, as adopted by Chapter 590 of the Laws of 1922, the Comptroller required plaintiff, as a condition precedent for the issuance of said license, to file with its application therefor, a bond in due form to the People of the State of New York, in the penal sum of $1,000 with sureties, conditioned that the plaintiff would not be guilty of any fraud or extortion and would not exact or [fol. 8] receive a price for any ticket or evidence of the right of entry in excess of the price authorized by Section 172 of said statute, to-wit: in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry. A copy of said bond so filed by the plaintiff is annexed hereto marked Exhibit C and made a part hereof.

Ninth. Pursuant to said statute, Chapter 590 of the Laws of 1922, a suit to recover on said bond may be brought by the Comptroller on the relation of any party aggrieved, in a court of competent jurisdiction; and in the event that plaintiff has violated any of the conditions of said bond, to-wit: that if it resells any ticket or other evidence of right of entry to any theatre, place of amusement or entertainment or other place where public exhibitions, amusements,

contests or performances are given at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry, then recovery for the full penal sum of said bond may be had in favor of the People of the State; and in the event that plaintiff shall charge for any ticket a price in excess of the price authorized by said statute the Comptroller is empowered, upon notice and after hearing, to revoke said license so issued to plaintiff; and plaintiff, its officers and agents will be guilty of a misdemeanor.

Tenth. The defendant, Joab H. Banton, as District Attorney of the County of New York, and defendant, Vincent B. Murphy, as Comptroller of the State of New York, have threatened to and will enforce said statute in each and all of its terms and the whole thereof and particularly against this plaintiff its officers and agents in the event that it resells or engages in the business of reselling any tickets [fol. 9] or other evidences of the right of entry to any theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are given, at a price in excess of fifty cents in advance of the price printed on the face of such tickets or other evidences of the right of entry, and will forfeit plaintiff's license (Exhibit B), to do business as aforesaid, and enforce the penalty of said bond (Exhibit C), and proceed to prosecute the plaintiff, its officers and agents criminally for an alleged violation of said statute.

Said statute is in its terms so drastic and the penalties attached to the violation of the terms thereof are so great that neither the plaintiff, its officers nor agents may resell any ticket or other evidence of the right of entry to any theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are given, at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry, even for the purpose of testing the constitutionality and validity of the said statute (Exhibit A) or the application of said statute, and unless this Court shall determine the validity and application of said statute in this proceeding, plaintiff, its officers and agents will be compelled to submit to said statute whether the same be valid or invalid and will be compelled to submit to the defendants' interpretation thereof and to

the threats of the defendants as aforestated and will thereby be deprived of their property and liberty without due process of law and denied the equal protection of the law in contravention of the 14th Amendment to the Constitution of the United States, and plaintiff has no adequate remedy at law and is relievable only in a Court of Equity.

[fol. 10] Defendant, Joab H. Banton, as District Attorney of the County of New York, has stated and published announcements from time to time in the newspapers in the City and County of New York threatening to enforce the said statute by criminal proceedings and threatening prosecution of all persons who resell, and has heretofore enforced said statute by criminal proceedings and prosecution against persons who had resold tickets or other evidences of the right of entry at a price in excess of fifty cents in advance of the price printed on the face thereof.

Eleventh. Chapter 590 of the Laws of 1922 is unconstitutional and void and each and every section thereof is unconstitutional and void under the 14th Amendment to the Constitution of the United States in that it deprives plaintiff of its liberty and property without due process of law and of the equal protection of the laws.

Twelfth. If plaintiff is not permitted to resell any ticket or other evidence of the right of entry to any theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are given, at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry, it will suffer great and irreparable loss for which it will have no adequate remedy at law but is relievable only in the Court of Equity.

Wherefore plaintiff prays:

1. That Joab H. Banton as District Attorney of the County of New York, and Vincent B. Murphy, as Comptroller of the State of New York, be enjoined and restrained by preliminary and permanent order and injunc-

[fol. 11] tion of this Court from bringing directly or indirectly and from permitting to be brought directly or indirectly any proceeding at law or in equity for the purpose of enforcing said statute, Chapter 590 of the Laws of 1922,

against the plaintiff, its officers or agents, or any of them, upon plaintiff reselling or attempting to resell or engaging in the business of reselling any tickets or other evidences of the right of entry to any theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are given, at a price in excess of fifty cents in advance of the price printed on the face of such tickets or other evidences of the right of entry, and from revoking plaintiff's license, said Exhibit B, and from enforcing by suit or otherwise the penalty prescribed in said bond, Exhibit C, or from prosecuting criminally the plaintiff, its officers or agents, or any of them, for reselling or attempting to resell any ticket or other evidence of the right of entry to any theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are given, at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry; and that an order to show cause issue herein upon application of the plaintiff directed to the above-named defendants requiring them to show cause why a temporary injunction should not issue as prayed for herein.

2. That said statute, Chapter 590 of the Laws of 1922, and each and every part and section thereof, be declared to be unconstitutional, illegal and void, and that a perpetual injunction be issued restraining the enforcement of said said statute, and each and every part and section thereof, as hereinabove prayed for.

[fol. 12] 3. That a writ of subpœna may issue to the defendants requiring them to answer this Bill of Complaint fully and truthfully, but not on oath, an oath being hereby waived, and that further and general relief be granted as the nature of plaintiff's case may require or to equity may seem just and proper.

Guggenheimer, Untermyer & Marshall, Solicitors for Plaintiff.

Office and Post Office Address: No. 120 Broadway, Borough of Manhattan, New York City.

[fol. 13] *Duly sworn to by David Marks. Jurat omitted in printing.*

[fol. 14] EXHIBIT "A" TO BILL OF COMPLAINT

Sec. 167. Matters of Public Interest.—It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exhorbitant rates and similar abuses.

Sec. 168. Reselling of Tickets of Admission; Licenses.—No person, firm or corporation shall resell or engage in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held without having first procured a license therefor from the comptroller. Such license shall be granted upon the payment by or on behalf of the applicant of a fee of one hundred dollars and shall be renewed upon the payment of a like fee annually. Such license shall not be transferred or assigned, except by permission of the comptroller. Such license shall run to the first day of January next ensuing the date thereof, unless sooner revoked by the comptroller. Such license shall be granted upon a written application setting forth such information as the comptroller may require in order to enable him to carry into effect the provisions of this article and shall be accompanied by proof satisfactory to the comptroller of the moral character of the applicant.

Sec. 169. Bond.—The comptroller shall require the applicant for a license to file with the application therefor a bond in due form to the people of the state of New York in the penal sum of one thousand dollars, with two or more sufficient sureties, who shall be freeholders within the state of New York, conditioned that the obligor will not be guilty of any fraud or extortion, and will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by this article. The comptroller shall keep books wherein shall be entered in alphabetical order all licenses granted and all bonds re-

ceived by him as provided for in this article, the date of the issuance of such licenses and the filing of such bonds, which record shall be open to public inspection. A suit to recover on the bond required to be filed by the provisions of this article may be brought by the comptroller or on the relation of any party aggrieved in a court of competent jurisdiction and in the event that the obligor named in such bond has violated any of the conditions of such bond, recovery for the full penal sum of such bond may be had in favor of the people of the state.

Sec. 170. Revocation of Licenses.—In the event that any licensee shall be guilty of any fraud or misrepresentation or shall charge for any ticket a price in excess of the price authorized by this article or otherwise violate any of the provisions of this article or any other law or local ordinance, the comptroller shall be empowered, on giving ten days' notice by mail to such licensee, and on affording such licensee an opportunity to answer the charges made against him, to revoke the license issued to him.

Sec 171. Supervision of Comptroller.—The comptroller [fol. 15] shall have the power, upon complaint of any citizen or of his own initiative, to investigate the business, business practices and business methods of any such licensee if in the opinion of the comptroller such investigation is warranted. Each such licensee shall be obliged, on request of the comptroller, to supply such information as may be required concerning his business, business practices or business methods.

Sec. 172. Restriction as to Price.—No licensee shall resell any such ticket or other evidence of the right of entry to any theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are given at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry. Every person, firm or corporation who owns, operates or controls a theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are held shall, if a price be charged for admission thereto print on the face of each such ticket or other evidence of the

right of entry the price charged therefor by such person, firm or corporation.

Sec. 173. Violations; Penalties.—Every person, firm or corporation who resells any such ticket or other evidence of right of entry or engages in the business of reselling any such ticket or other evidence of the right of entry, without first having procured the license prescribed and filing of a bond required by this article shall be guilty of a misdemeanor. Every person, firm or corporation who violates any provisions of this article shall be guilty of a misdemeanor.

Sec. 174. Constitutionality of Article.—In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of the remaining provisions of the article.

Sec 2. This act shall take effect immediately.

[fol. 16] Exhibit "B" to Bill of Complaint

License No. 3. Expires December 31, 1925

State of New York, Comptroller's Office

License to Sell Tickets of Admission to Theatres, Places of Amusement, or Entertainments

Tyson and Brother—United Theatre Ticket Offices, Inc., whose principal office or place of business is located at 1494 Broadway, City of New York, State of New York, having fully complied with the provisions of Article 10 ½ of the General Business Law, and acts amendatory thereof and supplemental thereto, and having duly paid the fee of One Hundred Dollars ($100), therein required to be paid to the Comptroller, is hereby licensed to resell or engage in the business of reselling tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held, and to conduct such business subject to all provisions

of the said Article, for a period from the date hereof to January 1, 1926.

This license is granted upon application duly made, signed and verified by August Kiesele, Secretary and Treasurer.

In witness whereof, I have hereunto set my hand and affixed the seal of the Comptroller at his office in the City of Albany, State of New York, this 1st day of January, 1925.

J. E. O'Kane Deputy Comptroller.

[fol. 17] EXHIBIT "C" TO BILL OF COMPLAINT

Know all men by these presents that we—Tyson & Brother—United Theatre Ticket Offices, Inc., of 1494 Broadway New York City, as principal, and United States Fidelity & Guaranty Company, of 75 William St., New York City, as surety, are held and firmly bound unto The People of the State of New York in the penal sum of one thousand dollars ($1,000), lawful money of the United States of America, to be paid to the said People of the State of New York, their attorney or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

In witness whereof, we have hereunto set our hands and seals this 11th day of December, 1924.

Whereas, The above bounden principal has applied to the Comptroller of the State of New York for a license to engage in the business of reselling tickets of admission or other evidence of the right of entry to theatres and places of amusements or entertainment pursuant to the provisions of Article 10-b of the General Business Law and acts amendatory thereof and supplemental thereto;

Now the condition of this obligation is such that if the Comptroller of the State of New York shall issue to the above bounden principal the said license, applied for, and if the said principal shall not be guilty of any fraud or extortion and will not exact or receive a price in excess of

fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry, then this obligation to be void; otherwise to remain in full force and virtue.

Tyson & Brother—United Theatre Ticket Offices, Inc., 1494 Broadway, by Augustus Kiesele, Sec. & Treas. Attest: (L. S.). D. Marks. United States Fidelity & Guaranty Company, by C. D. Marsac, Attorney-in-fact. Attest: Adolphus A. Jackson. (Seal of Surety Company.)

#277 457-24

STATE OF NEW YORK,
County of New York, ss:

On this 10th day of December, 1924, before me personally appeared the above named Augustus Kiesele, to me known to be the same person described in and who executed the above instrument, and duly acknowledged the execution thereof.

Regina Lachs, Notary Public. Bronx County Cl'k's No. 104. Reg. No. 2678. New York County Cl'k's No. 516. Reg. No. 6385. Term expires March 30, 1926.

STATE OF NEW YORK,
County of New York, ss:

On this 10th day of December, 192-, before me personally appeared Augustus Kiesele, to me known, who being by me duly sworn did depose and say that he is the Secretary & Treasurer of Tyson & Brother—United Theatre Ticket Offices, Inc., of the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

Regina Lachs, Notary Public. Bronx County Cl'k's No. 101. Reg. No. 2678. New York County Cl'k's No. 510. Reg. No. 6385. Term expires March 30, 1926.

[Endorsed:] Bond under Article 10-B of the General Business Law, of —— —— to The People of the State of New York. Approved as to form: —— ——, Approved: —— ——, Attorney-General. Approved: —— ——, Comptroller. Filed —— —, ——.

Regulations Governing the Execution of Surety Company Bonds

I. Proof of the execution of an instrument executed by a corporation, must be by acknowledgment of officer authorized to execute the same by the board of directors of the corporation. Such acknowledgment must be under oath, showing genuineness of seal of corporation, genuineness of signature of each officer executing the bond or attesting the seal, and that the seal was affixed, and the signature attached by order of the board of directors.

II. Appointment of resident officers or attorneys in fact, authorized to execute bonds, if made by board of directors, should be shown by certified copy of resolution, making such appointments, under the seal of the company. If made by officers of company pursuant to resolution of board of directors, appointment may be shown by certified copy of such resolution, under seal of the company, accompanied, either,

(a) By original appointment, duly acknowledged, made pursuant to such resolution, or,

(b) By copy of such original appointment, with copy of acknowledgment, certified by the secretary under seal of the company.

III. Contracts of guaranty of the performance of an undertaking of a principal, should bear even date with the date of the principal undertaking, and should be executed after and not before execution of the undertaking by the principal.

IV. The offices of vice-president, second vice-president, and resident vice-president are three distinct offices. The offices of secretary, assistant secretary, acting secretary, resident secretary, and resident assistant secretary are five and not one. Papers should be executed and acknowledged by authorized officer in his own proper name and title.

V. A direction that the seal of the corporation shall be attested by a particular officer, requires the use of the word "attest," and not simply the signing of the instrument by the officer so named.

VI. Authority of each notary public or commissioner of deeds, taking an affidavit or acknowledgment should be shown by certificate of the county clerk of the county in which the affidavit or acknowledgment is taken.

VII. To meet the requirements of section 24 of the Insurance Law, bonds should be accompanied by sworn statement, showing the capital and surplus of the company. A statement showing the "surplus and undivided profits" in a lump sum, will not be accepted as a compliance with this rule.

VIII. In case of reinsurance of any portion of a risk insured, such reinsurance must be shown by certificate of the secretary of the reinsuring company, under seal of the company, showing the amount of such reinsurance, together with the date and number of the policy.

IX. In determining the limitation of risk prescribed in the Insurance Law, personal bonds of indemnity to the surety company will not be considered.

[fols. 18 & 18a] EXHIBIT D TO BILL OF COMPLAINT

Comptroller of the State of New York, Albany, N. Y.

DEAR SIR: We hereby hand you our check in the sum of $100. in payment of license fee and hereby request the issuance of a license to us, and we file herewith a bond in due form to The People of the State of New York in the penal sum of $1,000.00 the bondsman being (United States Fidelity and Guaranty Company) pursuant to your demand under Chapter 590 of the Laws of 1922 of the State of New York.

The tender of said license fee and the request for such license and the filing of said bond are made and done under protest and without waiver of claim by us that Chapter 590 of the Laws of 1922 of the State of New York is unconstitutional and void and that each and every section

thereof is unconstitutional and void under Article 1, Section 6 of the Constitution of the State of New York, and the Fourteenth Amendment of the Constitution of the United States, and without waiver of the protection of said provisions of the Constitutions of the State of New York and the United States.

Furthermore such tender of license fee and request for the issuance of a license, and the filing of said bond, are made and done by us under duress by reason of threats by the District Attorney of the County of New York that he will proceed to prosecute us under said Chapter 590 of the Laws of 1922 of the State of New York for failure to procure a license and file a bond pursuant to said act.

Very truly yours, Tyson & Brother—United Theatre Ticket Offices, Inc. (Sgd.) D. Marks, President.

[fol. 19] In United States District Court

[Title omitted]

Motion for Temporary Injunction

Comes now the above-named plaintiff and upon its verified Bill of Complaint herein and the affidavit of its President, David Marks, duly verified, and filed in the office of the Clerk of this Court, moves the Court for a preliminary injunction, pendente lite, restraining the defendant Joab H. Banton, as District Attorney of the County of New York, State of New York, from proceeding against plaintiff, its officers or agents, by criminal prosecution, and restraining the defendant, Vincent B. Murphy, as Comptroller of the State of New York, from revoking plaintiff's license to resell or engage in the business of reselling any tickets of admission, or any other evidences of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held, and exact or receive a price for any such tickets or evidences of the right of entry in excess of fifty cents (50¢) in advance of the price printed on the face of such ticket or other evidence of the right of entry, and from enforcing the penalty named in its bond heretofore

filed in the office of said Comptroller under color of Chap-
[fols. 20 & 20a] ter 590 of the Laws of 1922 of the State of New York, and from bringing directly or indirectly and permitting to be brought directly or indirectly any proceeding at law or in equity for the purpose of enforcing said statute against the plaintiff, its officers or agents, or any of them, upon plaintiff reselling or attempting to resell or engaging in the business of reselling any tickets of admission, or any other evidences of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held, and exact or receive a price for any such tickets or evidences of the right of entry in excess of fifty cents (50c) in advance of the price printed on the face of such ticket or other evidence of the right of entry.

Gugenheimer, Untermyer & Marshall, Solicitors for Plaintiff.

Office and Post Office Address: No. 120 Broadway, Borough of Manhattan, New York City.

[fol. 21] In United States District Court

[Title omitted]

Affidavit of David Marks

United States of America,
Southern District of New York,
State of New York, ss:

David Marks, being duly sworn, deposes and says:

I am the President of Tyson and Brother—United Theatre Ticket Offices, Inc., the plaintiff herein, and have been engaged in the business of Theatre Ticket Broker for upwards of thirty years. The first Theatre Ticket Agency was organized in the city of New York in the year 1859 by George I. Tyson who, for many years, maintained an office at 5th Avenue and 23rd Street, in the Fifth Avenue Hotel. I am informed by surviving members of the Tyson family and verily believe that Mr. Tyson at that time paid rent for his ticket office at the rate of $50. a month; that he paid messengers at the rate of $2. a week, salesmen at the

rate of $12. a week and the manger $20. a week. The average box office price of tickets at that time was $1. to $1.50 in the orchestra. The premium charged by the agency was an advance of fifty cents over the box office price. The tickets were all given to the agency on consignment, there [fol. 22] being no liability on the part of the agency for tickets remaining in its possession and being unsold. I am further informed by the same source and verily believe that the total annual expense of operating the theatre ticket agency organized by Mr. Tyson was at that time less than $10,000. The business included and the expense was incurred in not only the sale of theatre tickets but also of newspapers, magazines and periodicals which were all sold at the same stand.

The plaintiff is a New York corporation engaged in the business of reselling tickets of admission or other evidences of the right of entry to theatres, places of amusement or entertainment or other places where public exhibitions, games, contests or performances are held. The plaintiff's business was established in 1869 by two brothers of George I. Tyson. For many years it has performed a useful service for its customers, saving them the time and cost of going to box offices for their tickets, saving them the time which it would be necessary for them to spend in standing in line at box offices, preserving them from the annoyance of finding at one box office that they could not obtain tickets for the night desired and requiring them to go from box office to box office until they could find tickets for a performance which they desired to attend.

The plaintiff maintains thirty-one telephones for the convenience of its customers and fifty-five private wires communicating directly with various theatrical box offices in the City of New York. It does a business exceeding $1,500,000 per annum of which less than fifty per cent represents cash sales, the balance being charged to customers who are billed monthly. For five years last past the plaintiff has sold on an average approximately 300,000 tickets per annum.

[fol. 23] Customers call at the office of the plaintiff or telephone to the plaintiff asking for tickets in a specific part of a certain theatre for a certain date; if plaintiff has the tickets it sells them to the customer, otherwise plain-

tiff tries to purchase tickets for the customer or gives him the choice of tickets for another performance or for another night. Frequently when a customer insists upon obtaining tickets which plaintiff does not have, it is necessary for plaintiff to go to another broker and pay a price in excess of the price printed upon the face of the ticket.

Plaintiff employs ten messenger boys to deliver tickets to the homes and offices of its customers and other places convenient to them.

The average yearly cost of this service to the plaintiff for the three years last past is:

Rent	$24,000
Telephones	5,400
Salesmen	6,380
Messengers	5,200
Carefares	1,500
Cashier	2,280
Porter	1,200
Bookkeepers	10,300
Lighting	1,200
Stationery	1,200

It is necessary for the plaintiff to maintain an office in the heart of the theatrical district, centrally located, and large enough to permit of easy ingress and egress by its patrons. Plaintiff does not sell tickets or solicit business on the streets.

As compared with the expense of George I. Tyson when he founded the business of theatre ticket broker in the City of New York over sixty-five years ago, the present rental is $2,000. a month, the salaries of messengers $15. a week, of salesmen $35. a week, of the manager $100. a week; the item of telephone charges in its entirety has been superadded to the overhead of the business.

[fol. 24] Approximately one-half of the tickets dealt in by the plaintiff are subscribed for by it before the performance has opened in the City of New York and frequently before the performance has even been casted and it is known who is to appear therein. Such subscriptions must be made for eight weeks and must be paid for two weeks in advance. Sometimes the theatres charge a premium on the tickets so purchased. One successful performance has to carry about four failures or mediocrities.

If plaintiff fails to sell these tickets it is allowed to return no more than 25 per cent. of them, sometimes less.

In 1923 plaintiff subscribed for and paid in advance of the opening of various productions 140,500 tickets for which it paid the sum of $540,750.50. In 1924 plaintiff subscribed for and paid in advance of the opening of various productions 127,752 tickets for which it paid the sum of $491,604.15. From January 1st to July 1st, 1925, plaintiff subscribed for and paid in advance of the opening of various productions 81,924 tickets for which it paid the sum of $315,510.

In order to finance its business and purchase its tickets in advance it becomes necessary for the plaintiff to borrow annually large sums of money amounting in certain years to $75,000. upon which sums it is compelled to pay interest.

Tickets received from box offices on consignment must be returned by the plaintiff by 1:30 P. M. for matinees and by 7:30 P. M. for evening performances. A substantial number of these tickets received on consignment and of the tickets subscribed for in advance of the production remain daily in the hands of the plaintiff and are a total loss. During the three years last past plaintiff's loss on such unsold tickets has averaged 18,230 tickets of the value of $70,210.

[fol. 25] Plaintiff sustains other losses amounting to at least $5,000 a year as a result of claims by patrons that they never ordered the tickets reserved for them or that they ordered the tickets for a different performance.

The face prices of orchestra seats in New York theatres at present range from $2.75 to $5.50 apiece.

Plaintiff's business is a lawful one and the pursuit thereof cannot be prohibited directly or indirectly. It consists of the sale of merchandise and the performance of personal services for its customers.

In 1922 the Legislature of the State of New York, by Chapter 590 of the Laws of 1922, amended the General Business Law of the State of New York by adding thereto Sections 167 to 174 inclusive, a copy of which statute is annexed to the complaint herein and marked Exhibit A. By the adoption of that statute the State of New York has attempted to make it illegal to resell tickets of admission or other evidences of the right of entry to threatres, places

of amusement or entertainment or other places where public exhibitions, games, contests and performances are held at a price in excess of fifty cents in advance of the price printed on the face of the ticket or other evidence of the *right of entry*. It is declared that a violation of this price restricting provision shall be a misdemeanor and that a violation thereof will be ground for the revocation of plaintiff's license to do business and will be cause for the enforcement of the penalty prescribed in the bond in the sum of $1,000. filed by the plaintiff as a prerequisite to doing business as a theatre ticket broker in the State of New York. A copy of plaintiff's license and bond are annexed to the complaint herein and marked Exhibits B and C respectively.

[fol. 26] The defendant, Joab H. Banton, as the District Attorney of the County of New York, has threatened to enforce said statute against this plaintiff by criminal prosecution of the plaintiff, its officers and agents, and the defendant, Vincent B. Murphy, as Comptroller of the State of New York, has threatened to enforce the same by revocation of plaintiff's license and enforcement of the penalty named in plaintiff's said bond in the event that plaintiff resells or attempts to resell any ticket of admission or other evidence of the right of entry to theatres, places of amusement or entertainment or other places where public exhibitions, games, contests and performances are held at a price in excess of fifty cents in advance of the price printed on the face of the ticket or other evidence of the right of entry.

By reason of said statute and the threatened enforcement thereof, plaintiff is unable to sell its merchandise and render services to its customers at a price or for a sum greater than fifty cents a ticket. Under this statute, by reason of the heavy cost of its overhead and cost of delivering tickets, and the cost of obtaining tickets at a premium for resale to its customers, plaintiff is frequently unable to sell tickets except at a loss.

Said statute is unconstitutional and null and void and each and every section thereof is unconstitutional and null and void in that it deprives the plaintiff of its liberty and property without due process of law and deprives it of the equal protection of the law secured to it by the 14th Amend-

ment to the Constitution of the United States, and the enforcement thereof or any section thereof by the defendants or either of them would deprive plaintiff of its liberty and property without due process of law and would deprive it of the equal protection of the law.

[fols. 27 & 27a] The statute is in its terms so drastic and the penalties attached to the violation of the terms thereof are so great that neither the plaintiff, its officers or agents, may resell any ticket or other evidence of the right of entry to any theatre at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry even for the purpose of testing the constitutionality and validity of the statute or the application of the statute, and unless this Court shall determine the validity and application of said statute in this proceeding the plaintiff, its officers and agents will be compelled to submit to the statute whether the same be valid or invalid and will be compelled to submit to the defendants' interpretation thereof and to the threats of the defendants to enforce the same, and plaintiff, its officers and agents will thereby be deprived of their property and liberty without due process of law and denied the equal protection of the law in contravention of the 14th Amendment to the Constitution of the United States. Plaintiff has no adequate remedy at law and is relievable only in a Court of Equity.

Wherefore plaintiff prays that a preliminary injunction of this Court be granted, pendente lite, restraining the defendant, Joab H. Banton, as District Attorney of the County of New York, State of New York, from proceeding against plaintiff, its officers or agents, by criminal prosecution, and restraining the defendant, Vincent B. Murphy, as Comptroller of the State of New York, from revoking plaintiff's license and enforcing the penalty named in its bond.

David Marks.

Sworn to before me this 6th day of August, 1925. George J. Baumann, Notary Public. New York County Clerk's No. 439. New York County Register's No. 7285. Commission expires March 30, 1927. (Seal.)

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

AFFIDAVIT OF DAVID MARKS

David Marks, being duly sworn deposes and says:

I have read the affidavits of John McBride and John L. McNamee, which have just been served in this matter upon the plaintiff's counsel. The said McBride was until recently an officer of Tyson & Company and is related to John L. McNamee. The McBride Theatre Ticket Offices, Inc. and Tyson & Company have cooperated in the business of selling theatre tickets for some years past. Mr. McBride was active in bringing about the enactment of Chapter 590 of the Laws of 1922. He appeared before legislative committees and before Governor Miller on the several occasions when such legislation was under discussion and advocated the passage of the bill. It is evident to those who are familiar with the business that his motive was to drive out of the business of ticket brokerage those who had for years been engaged in that business, in order that he and those affiliated with him might monopolize the business [fol. 29] of ticket brokerage. I have learned from many of my customers, and it is generally understood, that the McBride Theatre Ticket Offices, Inc., charges $5 annually to those of its customers who have the privilege of keeping a charge account, and in addition thereto it charges for the delivery of tickets purchased from it. It has so advertised in the public print.

I have likewise been informed by many customers, and it is generally understood, that Tyson & Company charge $1 per month to their customers for the privilege of maintaining a charge account, and likewise charge for the delivery of tickets purchased from them.

It is notorious that many of the important clubs in the City of New York procure tickets for their members and charge for procuring them substantial sums about fifty cents in advance of the prices stamped upon the tickets.

The special service department maintained by plaintiff, referred to in the affidavit of Mr. Banton, was inaugurated some time prior to the enactment of the statute referred to and was not for the purpose of circumventing said statute and does not in fact violate the same.

[fols. 30 & 30a] There are in the Boroughs of Manhattan and Brooklyn at least 108 first-class theatres. In the Borough of Manhattan there are at least 283 moving picture theatres, in the Borough of Brooklyn at least 315, in the Borough of Queens 71 and in Richmond 9. There are also many other places of amusement in those localities. The ticket brokers have not control of the supply of tickets to these various places of amusement. The various ticket brokers are in sharp competition with one another. There is also in the City of New York a cut-rate ticket agency which sells many thousands of tickets at prices less than those charged at the theatres, and which tickets it is understood are placed on sale at such agency by the theatres.

David Marks.

Subscribed and sworn to before me this 9th day of October, 1925. J. G. Hemerth, Notary Public, New York Co. (S.)

[fols. 31-34] In United States District Court

[Title omitted]

Order Setting Hearing on Motion for Temporary Injunction

The Court having considered the verified bill of complaint duly filed in the above entitled action, and the affidavit of David Marks duly verified, and the motion of the plaintiff for a temporary injunction herein, and it appearing to the Court that the suit is one requiring the presence at the hearing of the application for a temporary injunction of three judges, one of whom at least shall be a Justice of the Supreme Court of the United States or a Circuit Judge of the United States, it is, by the Court

Ordered that the application for such temporary injunction be heard on the ninth day of October, 1925, at 2 o'clock

in the afternoon, in the United States Circuit Court of Appeals, Court Room 434, Old Post Office Building, Borough of Manhattan, City of New York, State of New York, before Hon. Henry W. Rogers Circuit Judge, Hon. Henry W. Goddard District Judge, and Hon. John C. Knox District Judge.

Dated August 12, 1925.

Jno. C. Knox, United States District Judge.

[fol. 35] In United States District Court

[Title omitted]

Answer of Defendant Banton—Filed September 17, 1925

To the Honorable the Judges of the District Court of the United States in and for the Southern District of New York:

Joab H. Banton, District Attorney of the County of New York, one of the defendants in the above-entitled suit, for an answer to the complaint herein says:

First. He admits the allegations contained in paragraphs marked "Third", "Sixth" and "Ninth" of the said complaint.

Second. He denies the allegations contained in paragraph marked "Eleventh" of the said complaint.

Third. He denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs marked "Second", "Fourth", "Fifth", "Seventh" and "Eighth" of the said complaint.

Fourth. He admits the allegations contained in paragraph marked "Tenth" of the complaint that, as District Attorney of the County of New York, he has heretofore enforced the provisions of Chapter 590 of the Laws of the State of New York of 1922, by criminal proceedings, and that he will continue to enforce the provisions thereof; he [fols. 36 & 36a] denies, however, that the consequences of

the enforcement of the said statute will be to deprive the plaintiff of its property and liberty without due process of law, or to deny the plaintiff the equal protection of the law; and denies that the said statute is a drastic one, and that the plaintiff has no adequate remedy at law.

Fifth. He denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph marked "Twelfth" of the said complaint that the plaintiff will suffer great and irreparable loss if the plaintiff is not permitted to resell tickets of the nature and character described therein at a price in excess of fifty cents in advance of the price printed on the face of such tickets; and denies that the plaintiff has no adequate remedy at law.

Sixth. He alleges as a separate and distinct defense to the said bill that Chapter 590 of the Laws of the State of New York of 1922, is, in all respects, a valid and constitutional enactment, and that the plaintiff has an adequate and complete remedy at law.

Wherefore the defendant, Joab H. Banton, prays that the bill of complaint herein be dismissed with costs.

Joab H. Banton, A. D., District Attorney of the County of New York. Felix C. Benvenga, Solicitor for the Defendant Joab H. Banton, District Attorney of the County of New York.

[fol. 37] In United States District Court

[Title omitted]

Answer of Defendant Murphy—Filed October 20, 1925

To the Honorable the Judges of the District Court of the United States in and for the Southern District of New York:

Vincent B. Murphy, Comptroller of the State of New York, one of the defendants in the above-entitled suit, for an answer to the complaint herein, says:

First. He admits the allegations contained in paragraphs marked "Third," "Sixth" and "Ninth" of the said complaint.

Second: He denies the allegations contained in paragraph marked "Eleventh" of the said complaint.

Third. He denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs marked "Second," "Fourth," "Fifth," "Seventh" and "Eighth" of the said complaint.

Fourth. He admits the allegations contained in paragraph marked "Tenth" of the complaint that, as Comptroller of the State of New York, he has heretofore enforced the provisions of Chapter 590 of the Laws of the State of New York of 1922, and that he will continue to enforce the provisions thereof; he denies, however, that the consequen- [fol. 38] ces of the enforcement of the said statute will be to deprive the plaintiff of its property and liberty without due process of law, or to deny the plaintiff the equal protection of the law; and denies that the said statute is a drastic one, and that the plaintiff has no adequate remedy at law.

Fifth. He denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph marked "Twelfth" of the said complaint will suffer great and irreparable loss if the plaintiff is not permitted to resell tickets of the nature and character described therein at a price in excess of fifty cents in advance of the price printed on the face of such tickets; and denies that the plaintiff has no adequate remedy at law.

Sixth. He alleges as a separate and distinct defense to the said bill that Chapter 590 of the Laws of the State of New York of 1922, is, in all respects, a valid and constitutional enactment, and that the plaintiff has an adequate and complete remedy at law.

Wherefore the defendant Vincent B. Murphy prays that the bill of complaint herein be dismissed with costs.

Vincent B. Murphy, Comptroller of the State of New York. Albert Ottinger, Attorney-General of the State of New York, Solicitor for the Defendant Vincent B. Murphy, Comptroller of the State of New York.

Office and P. O. Address: Albany, N. Y.

[fols. 39 & 39a] *Duly sworn to by Vincent B. Murphy. Jurat omitted in printing.*

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOAB H. BANTON

UNITED STATES OF AMERICA,
Southern District of New York,
State of New York,
County of New York, ss.

Joab H. Banton, being duly sworn, deposes and says:

That he is the District Attorney of the County of New York, State of New York, and, as District Attorney, is one of the defendants herein.

That the motion for a temporary injunction herein is to enjoin the District Attorney of the County of New York from proceeding against the plaintiffs and others by a criminal prosecution, and to restrain the defendant Vincent B. Murphy, as Comptroller of the State of New York, from revoking plaintiff's license pursuant to the provisions of Chapter 590 of the Laws of 1922 of the State of New York, constituting Article X—B, composing sections 167 to 174 inclusive of the General Business Law, Consolidated Laws of the State of New York. A copy of the provisions of this law are attached to the defendant's bill of complaint herein, and in the copy of opinion of United States Supreme Court attached herewith (Exhibit A).

[fol. 41] That prior to the commencement of the action herein a prosecution was started and a conviction obtained

for a violation of §168 of the law (supra) in the case of People v. Weller, wherein the defendant was convicted in the Court of Special Sessions of the City of New York of reselling and engaging in the business of reselling tickets of admission without having secured a license, pursuant to the statute, and fined $25, or stand committed to the City Prison for five days. This conviction was had on February 16th, 1923.

An appeal was taken therefrom by the defendant Weller to the Appellate Division of the Supreme Court of the State of New York, First Department, and that Court affirmed the judgment of conviction (two of the five judges dissenting), on the 30th of November, 1923 (See People v. Weller, 207 App. Div. 337).

An appeal was thereupon taken by the said defendant to the Court of Appeals of the State of New York, and that Court affirmed the judgment of the Appellate Division (one of the seven judges dissenting) on February 19th, 1923 (See People v. Weller, 237 N. Y. 316).

Thereafter, a writ of error was taken to the Supreme Court of the United States to review the said Judgment, and on May 25th, 1925, the judgment was affirmed, Mr. Justice McReynolds delivering the opinion of the Court, a copy of the opinion being attached hereto and marked Exhibit "A."

Upon the trial of the defendant Weller in the Court of Special Sessions, David Marks was called as a witness by the defense, was sworn and testified. A copy of his testimony from the printed case on appeal in the Supreme Court of the United States is attached herewith, marked Exhibit "B." Also a copy of the statement of Mr. David Marks to an Assistant District Attorney of New York County, in November, 1918, that was offered in evidence on the trial of the case of People v. Weller, which statement appears in the printed record before the Supreme Court of the United States, is attached herewith as Exhibit "C."

[fol. 42] Deponent states, on information and belief, that Mr. Marks at the time of making the statement (Exhibit "C"), was president of the United Theatre Ticket Corporation, and is the same Mr. Marks who makes the affidavit in the moving papers herein. That the United Theatre

Ticket Corporation was subsequently acquired and merged together with the corporation of Tyson Brothers on or about August, 1920, by a corporation of State of New York, to wit: Tyson & Bros.—United Theatre Ticket Offices, Inc., the plaintiff herein.

Mr. Marks, in his statement in 1918 to the Assistant District Attorney and in his testimony before the Trial Court in January, 1923, outlined in considerable detail the nature of the business of theatre ticket brokers in the City of New York. This testimony of Mr. Marks is referred to in the opinion of Mr. Justice Martin, writing for the Appellate Division in People v. Weller (see 207 App. Div. 337), and in the opinion of Mr. Justice Lehman, writing for the Court of Appeals in the same case. (See 237 N. Y. 316.)

Your deponent has spoken with persons familiar to a greater or less extent with the business of theatre ticket brokerage in New York. He is informed and verily believes that the revenue derived by the ticket brokers in the purchase and resale of theatre tickets is not confined exclusively to the fifty cents limit placed upon the resale of tickets above the price printed upon the face of the theatre ticket; that ticket brokers who have a number of charge accounts with their patrons or customers charge such patrons or customers certain amounts of money to defray the cost, in whole or in part, of bookkeepers, clerical and other help, employed by the brokers to keep track of these charge or credit accounts of the patrons and customers; that this account charged is not fixed, but varies in amounts with the various brokers.

Your deponent is informed and verily believes that, in addition to the foregoing charges, some brokers increase [fol. 43] the revenue derived from the sale of tickets of admission by contracting with individuals, corporations, firms and the like, to reserve for the benefit of these individuals, corporations and firms, theatre tickets for the various theatrical productions up to a very short time before the beginning of the performances in the theatres, and guarantee to these persons that there will be available for them upon very short notice to the broker, selected tickets for any of the current attractions.

With some of the ticket brokerage offices this arrangement is known as a "Special Service Department," and

the like, and customers and patrons of the brokers made written application for membership in this preferred class of customers. That customers, in order to enjoy the benefit of this special arrangement, pay to the brokers various amounts of money for this privilege or service on a yearly basis. Attached herewith and made part hereof are Exhibits "D" [Booklet bearing plaintiff's name explaining this special service] and "E" [Application card for membership in this Special Service Departmental], issued, as your deponent is informed and verily believes, by the plaintiff corporation herein.

Your deponent is informed and verily believes that great numbers of individuals, corporations and firms, as customers, have entered into agreements, contracts or membership schemes for the so-called "Special Service" privilege, and that immense sums of money are annually paid ilege, and that immense sums of mony are annually paid by customers and patrons to ticket brokers who have this "Special Service" Department in excess of the fifty cents charged by such brokers over the price stamped on each ticket, as fixed by the provisions of the General Business Law (supra).

Your deponent is informed and verily believes that ticket brokers entering into the "Special Service" arrangements with their customers, reserve tickets for theatrical performances for these preferred customers to within a very short time of the beginning of the respective performances. [fol. 44] That pursuant to this arrangement quantities of theatre tickets in the hands of such brokers are unable to be sold by them to the general public, and results in such ticket being either stamped returned to the theatres as unsold, or left as a loss in the hands of these brokers.

By reason of the fact that these contracts are considered by the brokers as strictly confidential transactions, your deponent has found it difficult to secure definite information as to the details of these contracts, the number entered into by brokers, and the revenue derived by these brokers from the contracts as aforesaid.

Your deponent is informed and verily believes that the loss, as alleged in the affidavit of David Marks in the moving papers, wherein it is alleged that the loss on unsold tickets has averaged 18,230 tickets per year of the value of $70,-

210.00 by his corporation, is greatly in excess and out of proportion to the losses sustained by other brokers that yearly resell great quantities of theatre tickets, and is probably occasioned by reason of the "Special Service" guarantee, and the plaintiff is reimbursed in a large part for the alleged losses sustained by monies received from customers entering into the "Special Service" membership.

Joab H. Banton.

Sworn to before me this 9 day of October, 1925. John Buckley, Notary.

[fol. 45] Exhibit A to Affidavit of Joab H. Banton

Supreme Court of the United States, October Term, 1924

No. 349

Reuben Weller, Plaintiff in Error,

vs.

The People of the State of New York

In Error to the Court of Special Sessions of the City of New York, State of New York

(May 25, 1925)

Mr. Justice McReynolds delivered the opinion of the Court.

Chapter 590, New York Laws 1922, added eight sections, 167-174, to the General Business Law of the State, They are copied in the margin.* Section 168 directs: "No person, firm or corporation shall resell or engage in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment or other places where public exhibitions, games, contests, or performances are held without having first procured a license therefor from the comptroller."

*Sections 167 to 174, inclusive, of "General Business Law" of the State of New York omitted; printed side page 14, ante.

And §173 declares every violation of the inhibition shall be a misdemeanor.

By an information in the Court of Special Sessions, New York, the District Attorney accused plaintiff in error of engaging in the business of reselling theatre tickets without the license required by law. The evidence showed he was engaged in that business, and it was conceded he had never taken out a license or complied with Chapter 590. His defense rested upon the claim that the statute is repugnant to the Fourteenth Amendment. The Trial Court adjudged him guilty and imposed a fine of twenty-five dollars. This was affirmed by the Appellate Division and by the Court of Appeals, 207 App. Div. 337; 237 N. Y. 316. In an extended opinion the latter Court upheld the challenged enactment, but said nothing of the possibility of sustaining the license provisions if those relating to resale prices were invalid. [fols. 46-48] Counsel for plaintiff in error now insists that the two provisions are inseparable; that those which undertake to establish resale prices are clearly invalid; and, consequently, the whole Act must fall. On the contrary, counsel for the People maintain that the power of the State to require such licenses is clear and that we need not determine the validity of the price restrictions.

It is not, and we think it cannot, seriously be urged that the State lacked power to require licenses of those engaging in the business of reselling theatre tickets. The conviction and sentence were for failure to observe that requirement. In the absence of an authoritative announcement of another view by some Court of the State we shall hold this provision severable and valid. Brazee v. Michigan, 241 U. S. 340. The statute itself declares (§174): "In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of the remaining provisions of the article." If §172, which restricts resale prices were eliminated, a workable plan would still remain. See Dorchy v. Kansas, 264 U. S. 286.

The judgment of the court below is affirmed.

[fol. 49] Exhibit "B" to Affidavit of Joab H. Banton

David Marks, a witness called by the defense, being duly sworn, testified as follows:

Direct examination by Mr. Marshall:

Q. You reside in the City of New York?
A. Yes, sir, at 166 West 87th Street.
Q. What is your business?
A. Theatre Ticket Broker.
Q. How long in that business?
A. Thirty years.
Q. Are you well acquainted with the theatre ticket brokerage business?
A. Yes, sir.
Q. Do you know how long that business has been carried on in this community?
A. Over sixty years.
Q. Do you know who the pioneer of that business was?
A. George Tyson.
Q. Is that business still in existence?
A. Yes, sir.
Q. How long in business?
A. Fifty-one years.
Q. What do you know about the duration of the existence of the McBride Agency?
A. Forty-five years approximately.
Q. In a general way, how is that business carried on and has it been carried on?
A. We have charge accounts with various people in the City of New York and outside of New York and we do a cash business, and a charge of fifty cents is still maintained in the large offices in the City of New York.
Q. And occasionally you charge more?
A. Yes, sir.
Q. Why is that?
A. We are compelled to buy merchandise months in advance, and if the show is a poor show the loss is ours.
Q. You look upon these tickets as merchandise?
A. Yes, sir.
Q. Whom do you get these tickets from?
A. Theatre managers.

Q. How do you get them from the theatrical managers.

A. We buy them in blocks, each office is allowed so many seats.

Q. The theatrical managers put on a production whatever the play may be?

A. Yes, sir.

Q. Then they say to the ticket brokers, that they will allow them to have a certain number of tickets for that production?

A. Yes, sir.

Q. When is that part of the arrangement made?

A. Before the show is cast and before we know anything about who is in the show, we are sent for and told how many tickets we are to get and each office has to pay, is compelled to buy.

Q. Who sends for you?

A. The managers of the various productions.

Mr. Hogan: I move to strike out the testimony up to the present time given by this witness on the ground that it is irrelevant, incompetent and immaterial. If Mr. Marshall concedes the facts, what is the purpose of this line of examination?

Mr. Marshall: Here is an act of the legislature which deals with a business that has been established for sixty years. It undertakes to fix the price that must be paid for tickets. It requires a bond and also requires a license, and the provisions are interwoven with the price that is to be charged for the tickets. Our contention is, that the attempt to regulate what price shall be is in violation of the Constitution, both of the State and the United States. We have [fol. 50] had that question before the Court of General Sessions, in the case of the People against Cohen and the People against Newman, in which case Mr. Justice Rosalsky wrote a very elaborate opinion and in which he holds that a statute or ordinance that would attempt to regulate the price of tickets is unconstitutional. This statute provides for the procuring of a license and also the price at which tickets shall be sold, and provides that a bond shall be given by a person who obtains a license, and that the license can be revoked and the bond enforced if there is any violation of statute. Consequently, if a charge is made beyond the price fixed by the statute, that would

result in a nullification of the license and would at once create a liability on the bond. Therefore, under the decisions, whatever might be the law as to the right to require a license, but for these provisions the whole statute is made null and void by their presence. I will be able to show this by a number of decisions of the Court of Appeals and of the United States Supreme Court. It is therefore necessary to show the method in which this business of selling tickets is carried on.

Mr. Petty: The defendant's attorney, Mr. Marshall, has referred to the case of People against Newman, 109 Miscellaneous Reports, and the Court there gave as one of its grounds, that the offense charge was a violation of an ordinance and not of an act of the legislature, on page 659. And further on stated, that error was committed by the Magistrate by excluding evidence offered by the defendants; and on page 652 of the same opinion his Honor says, while reasonableness of an act of the legislature may not be questioned, that is not the case where the Board of Aldermen pass an ordinance. This is not an ordinance but the act of the legislature. I would ask your Honor to look at Section 167, and say that we have the right to infer from that, that the legislature looked into these facts, and all the courts have held that when the legislature looks into the facts, they are competent to do so, and the case of the People against Newman has no bearing on the question, as that was a violation of an ordinance.

Mr. Marshall: We are not going to try anything except the question of the validity of the statute, but in order to get the proper light on the subject I am offering this testimony. It may not be known by the Court how the business is carried on, and how it is serving the public, and what the charge is made for. It is not so much for commodity as for the service of procuring the commodity for the person who desires the ticket. These facts are useful as giving a proper background to this case. Governor Miller vetoed a similar bill in 1921, and although he signed the bill of 1922, he expressed serious doubt of its constitutionality. The legislature cannot make a law constitutional or unconstitutional by labelling it a certain way. That is a matter I shall presently discuss. What we are now interested in is to show how this business is conducted and the rea-

son why it is necessary at times to charge more than fifty cents for a ticket. It can do no harm to take this evidence and your Honors may conclude to disregard it when you decide this case.

Mr. Petty: I am familiar with Governor Miller's letter, and it indicates the tendency of the times. The first bill he vetoed and the second he signed, and he stated that the licensing feature of the bill was valid. No doubt it is true, that a legislative declaration of facts that a certain use is a public one may not be held conclusive, but the declaration of the legislature is entitled to great respect.

I think we are willing to let this go in the record under our objection.

The Court: Your motion to strike out is denied.

[fol. 51] By Mr. Marshall:

Q. You are telling us just how the brokers get their tickets from the various theatre owners. You say, that when an attraction is about to be put on the boards, before there has been a production of the play at all, you are sent for, the various brokers, by the theatre owners and a conversation takes place?

A. Yes, sir.

Q. What is the nature of the conversation?

A. We are going to produce—the manager of the theatre representing the owner of the theatre, we are going to produce a show four weeks from next Monday night and it is going to open at a certain theatre, and they say, how many seats do you want for that show for eight weeks in advance. We have asked for time to see how many we can use for that production at that particular theatre, and we are not given time in many cases and we must purchase the number of tickets, and we have got to buy them for eight weeks in advance, and we don't know the name of the show or the case, and we are compelled to buy them at four and five dollars a piece plus the war tax and compelled to pay for them at that rate for eight weeks in advance, running into an investment of fifty or sixty thousand dollars.

Q. In other words, you finance the theatrical performance?

A. Yes, sir.

Q. And you have to pay in advance?

A. Yes, sir, and it takes hundreds of thousands of dollars

Q. Suppose the play is not a success?

A. They are left on our hands. We have a return privilege of twenty-five, sometimes fifteen and sometimes ten. If a person wants three tickets and we make a $1.50 total profit on tickets, that may have cost four or five dollars apiece.

Q. That has been going on all these years?

A. Yes, sir.

Q. And that is still the practice today?

A. Yes, sir.

Q. Do they ever take these plays off the boards before the full period of time?

A. I have not heard of two cases where they stopped the show.

Q. You have not heard of more than two or three cases where, notwithstanding the fact that the play is a failure, they have stopped the performance?

A. Yes, sir.

Q. And because you are bound to pay this amount, it is a dead loss if you cannot sell the tickets?

A. Yes, sir, a loss of thousands of dollars on a production.

Q. And that is your expierience?

A. Yes, sir.

Q. They allocate to the several ticket brokers of the city the number of tickets that they may have and the number that they are required to take if they want any tickets?

A. Yes, sir, right.

Q. What is the organization of these different ticket brokerage concerns?

A. They have a place of business. We pay twenty thousand dollars a year rent, with a twenty years lease, and our expenses are $156,000 a year, with the lease, bookkeepers, stenographers, salesmen and messengers and we are only the third largest in the City of New York.

Q. Which is the largest in the city?

A. Tyson Company, $500,000 a year.

Q. Why do you need this large staff?

A. We have to have a private telephone to the theatre, and we have five thousand dollars of telephone bills; we

have two telephone operators from nine to nine, two operators, practically two staffs, we call it a staff, one short day and one long day. We have to have salesmen, our place is filled all day with people and they all want successes and that swells our losses. We make one sale in seven to every eight person a sale and seven we lose over the telephone and at the counter, owing to not having the [fol. 52] merchandise the person desires. They all want front seats.

Q. They all want tickets for the successful plays and not for the others?

A. Yes, sir. We have eighteen salesmen, a cashier and head bookkeeper and a credit man and six assistant bookkeepers; we have over five thousand charge accounts.

Q. And you have messengers take the tickets to the place?

A. We deliver tickets to the theatre or send them to your home or leave them at your downtown office, or you stop for them on your way home.

Q. Do you have an established rate of profit?

A. It is fifty cents, we are not allowed to charge more.

Q. You have charged more in some cases?

A. We charge fifty cents for every ticket we handle.

Q. What you have said, as to the method of doing business is practically the same in all cases?

A. Yes, sir.

Q. Are there cases when you do charge more than fifty cents?

A. Yes, sir.

Q. Explain?

A. If a customer insists upon two tickets or four tickets for a certain attraction and we have not got them, and the customer requests or suggests that we go out and purchase them outside, we do that, and in that case we pay the market price and still add fifty cents for our service.

By Justice Nolan:

Q. What makes the market price?

A. The law of supply and demand.

Q. What is the law of supply and demand in reference to theatre tickets?

A. If a show is a big success everyone wants to see it.

Q. What makes the market price, the scalpers on the street, the speculators, or at the box office?

A. I don't quite get that.

By Mr. Marshall:

Q. Suppose there is a performance of Hamlet and it is very popular?

A. Yes, sir.

Q. And we will say you have no tickets for that and that you have a customer who desires two tickets for that play?

A. Yes, sir.

Q. In the case you have to go out and get these tickets for whatever is charged you?

A. Yes, sir, whatever is charged us by somebody else.

Q. And the fifty cents is payment for the service that you rendered to this customer for getting him those tickets?

A. Yes, sir, correct.

Q. You get for him the ticket that is indicated and for your service to the customer in supplying him with that ticket you make this additional charge?

A. Yes, sir.

Q. When you have not got the tickets you go out and get them from the person who may have them?

A. Yes, sir.

Q. Precisely as if you wanted to buy any other article for which there is a great demand and a limited supply, you have to pay whatever the man who has the article demands of you?

A. Yes, sir.

[fol. 53] By Justice Nolan:

Q. And the man that has the article, that is what you determine as the market price?

A. Yes, sir.

By Mr. Marshall:

Q. Will you explain what these charge accounts are, the way in which you carry on the business in reference to the charge accounts? You have five thousand customers whose names are on your books?

A. Yes, sir.

Q. They purchase tickets regularly?

A. Yes, sir.

Q. If they want to go to the theatre, they call you up and say that they want a certain number of tickets and they want you to get them for them?

A. Yes, sir.

Q. And you get them tickets and you charge them the amount that they are to pay you?

A. Yes, sir.

Q. And every month you sent them a statement and they pay you the amount?

A. Yes, sir, and we have losses at the end of the year.

Q. Sometimes they don't pay, just as in the case of any other credit business?

A. Yes, sir.

Q. If these people did not get these tickets from you in this way, how would they get them, they would have to go to the box office?

A. No, sir. The best they could get for any show is the fifteenth or sixteenth row.

Q. The best seats have been sold?

A. The choice seats.

Q. If anyone desires to go to the theatre for them at night, they would be far back in the house?

A. Yes, sir.

Q. Some of your customers are people who are hard of hearing?

A. Yes, sir.

Q. And they desire to get front seats?

A. Yes, sir.

Q. And there are some whose eyesight is bad?

A. Yes, sir. We have only one customer who wants the last row, she is afraid of fire.

Q. The further towards the front they get, the better they like it?

A. Yes, sir.

Q. If they stood in line at the theatre, they would have to stand there for quite a time?

A. Yes, sir.

Q. And they would have to leave their homes and places of business and wait around the theatre and lose a lot of time?

A. Yes, sir.

Q. And you as theatre ticket brokers relieve the customer of all that inconvenience and annoyance?

A. Yes, sir.

Q. Isn't it a fact that you sell tickets to people who live out of town?

A. Yes, sir, we receive letters from all over the state, and from as far away as Los Angeles, and I believe we have fifty customers in St. Louis alone, and we get orders every day by mail.

Q. They inform you that they will be in New York at a certain time?

A. Yes, sir, and that they want so many seats and they want to see so many shows, and send us their checks and leave the amount blank. Up until ten years ago you could get choice seats for $2.00, and now if the theatre has a [fol. 54] success it costs up to $5.50. If it is a failure it goes to the cut-rate ticket office. At best there are two hundred desirable seats for successful shows in New York City with an audience of one thousand to crowd into these two hundred seats. Nobody wants to go back of the tenth row, they all want the first five or six rows and it is impossible to please them all.

By Justice Herrmann:

Q. If the play runs long enough can't they be suited?

A. Lightning ran three years and there were thousands who did not get a chance to see it. Each office gets a few front seats, there are about two hundred choice seats, there are four to the small offices and fifty to the larger offices, how far the tickets will go in the first ten rows.

By Mr. Marshall:

Q. There are a great many strangers in town at various hotels?

A. Yes, sir.

Q. They don't know how long in advance of their coming when they will be here or what they want to see and yet they wish to go to the theatre?

A. Yes, sir.

Q. If they had to get their tickets in the old fashioned way, they would not be able to go to the theatre?

A. No, sir.

Q. And therefore they avail themselves of the agency of the ticket brokers, who will perform for them that service?

A. Yes, sir. We also take back all tickets up until eight o'clock. We got fifty-six cancellations last Thursday. We do that as a courtesy to the customer and the customer must be pleased, and if he brings a ticket back, the loss is ours if we cannot sell them.

Q. How many of these tickets prove to be a loss of a night?

A. Sometimes one hundred and sometimes two hundred. We have tickets running into $250,000 a year.

Q. Tickets you can never dispose of?

A. Yes, sir.

Q. And that includes tickets that were returned to you that you cannot dispose of?

A. Yes, sir. We have a customer ring up and orders tickets, and we presume he is on the wire, and when the bill is rendered he denies the goods and says he never saw the show and never had the goods. We have hundreds of cases where the loss is ours.

Q. If a man has not a very large establishment, such as yours, who has not so large a business as yours, he has to charge more than fifty cents to make ends meet?

A. Yes, sir, he cannot exist on it. We only have at best ten successes annually and we produce a hundred shows, and seventy-five of them are rank failures.

Q. They all have to have places of business and telephones and all other expenses?

A. Yes, sir.

Q. And the total amount of their expenses is such that in order to get an ordinary revenue out of the business, they have to charge above fifty cents on the price indicated on the ticket?

A. Yes, sir.

Mr. Marshall: As illustration, I offer in evidence the statement of the defendant, Reuben Weller.

Mr. Hogan: Under our general objection.

Mr. Marshall: It is a statement of the business done by Mr. Weller, the defendant in this case, from the period January 1st, 1921 to October 31st, 1922, showing the total re-

ceipts, the number of seats sold each month, the total premium that he received in all of his operating expenses.
[fol. 55] Mr. Hogan: Under the general objection to strike out all of this testimony.

The Court: Objection overruled. The statement is received in evidence.

(Marked Defendant's Exhibit "A" in Evidence.)

Q. The amount received for tickets over and above the amount marked on the ticket is called premium?

A. Yes, sir.

Q. What is meant by deadwood?

A. Unsold tickets, which is a great part of the operating expenses.

Defendant's Exhibit "A" omitted.

Cross-examination by Mr. Kilroe:

Q. Where is your place of business?

A. 1490 Broadway.

Q. How many people interested in your business?

A. Myself, Mr. Tyson and Mr. Kiesel.

Q. How many tickets do you sell per year?

A. Over one thousand tickets a day.

Q. That would be over three hundred thousand tickets a year?

A. Yes, sir.

Q. Your concern has not gone into bankruptcy?

A. No, sir.

Q. It has made money?

A. Made a comfortable living.

Q. Have you a license?

A. No, sir.

Q. How many theatres are there in the Borough of Manhattan?

A. Approximately sixty first-class theatres.

Q. Do you know what their capacity are?

A. Some as low as two hundred.

Q. The total capacity?

A. Around sixty thousand or fifty-five thousand.

Q. How many ticket speculators are there?

A. Ticket brokers?

Q. Yes, how many?

A. Tyson and Company have eighteen branches, would you call it one office, or call each branch an office?

Q. Call each branch a separate office?

A. About thirty offices.

Q. There are thirty offices where you can buy tickets from ticket brokers?

A. Yes, sir.

Q. And they are controlled by how many people?

A. Probably a dozen or fifteen.

Q. McBride is one of the largest?

A. Yes, sir.

Q. And he sells approximately how many tickets a year? Five hundred thousand tickets a year?

A. I think so.

Q. And his rate is fifty cents over the amount printed on the ticket?

A. Yes, sir.

Q. He has not gone into bankruptcy?

A. Not that I heard of.

Q. He has been doing business for forty-five years?

A. Yes, sir.

Q. Do you know whether McBride has a license?

A. I could not answer that.

Q. Have you heard that he has?

A. I have not.

Q. Have you heard how many tickets are sold by the brokers in a year?

[fol. 56] A. Approximately two million tickets.

Q. And that would be at least fifty per cent of the desirable seats in the theatre?

A. In the downstairs only.

Q. They don't deal in balcony seats?

A. The broker does not handle cheap seats, we don't sell ten a year. He might pick out for a success six of the cheaper seats, no reputable house will take only the first ten or twelve rows.

Q. Would you say, that the greatest percentage of the tickets sold are sold to out of town men?

A. I don't know.

Q. Don't you know that it is almost impossible for a resident of New York to get a choice seat?

A. No, sir, I don't agree with you; ninety or ninety-five per cent of my business is New Yorkers.

Q. You say, you sometimes charge over fifty cents?

A. Yes, sir.

Q. In what percentage of the tickets that you sell would that happen?

A. Ten tickets a day, or twenty tickets a day.

Q. Not any more?

A. Yes, sir, and many days none at all.

Q. The occasion for charging more than fifty cents is because you have to go outside and pay more for the tickets?

A. Yes, sir, right.

Q. Isn't it a custom among the brokers that they practice very extensively, if a man comes in for a ticket, the broker will say, I have not got it but I can get it for you, and have one of the salesmen take it out of his pocket?

A. No, sir, not us, we will give two tickets or *the* tickets, if he will give us two tickets for some other night in exchange.

Q. How many buy-outs a year does your concern make?

A. Approximately one hundred.

Q. What do you mean where you take a block of seats?

A. We are compelled to buy so many tickets for each show eight weeks in advance.

Q. The producer insists on you taking the seats?

A. Yes, sir.

Q. Do you have to pay a premium for good seats?

A. There never was a premium, only when they are on sale, they charge ten per cent.

Q. Didn't they charge twenty-five per cent?

A. They did but not since the war.

Q. Do you remember an investigation that was conducted two years ago by the District Attorney's Office?

A. Yes, sir.

Q. Do you remember the testimony of Mr. Fallon then?

A. No, sir, I don't.

Q. Where you present at that time.

A. I don't think I was.

Q. Among the thirty speculators, how do you arrange as to who gets the tickets?

A. Every one gets a few. I have the same seats year in and year out, if I am entitled to from 101 to 108 I get them.

By Mr. Marshall:

Q. The box office makes its schedule?
A. Yes, sir, and the succeeding man gives you the same seats.
Q. And that saves them a lot of trouble?
A. Yes, sir.

By Mr. Kilroe:

Q. And you charge for them at fifty cents advance?
A. Yes, sir.

[fol. 57] By Justice Nolan:

Q. Tell us how many of these 300,000 odd seats you get at the open market price?
A. Three or five thousand.
Q. That you get by exchange?
A. We don't charge any more on the exchange, we accommodate each other.
Q. About how many would you buy at the market price?
A. Sometimes ten or twenty a day and sometimes none.
Q. About how many out of the 300,000 seats that you sell?
A. I don't think it would not exceed five or ten thousand. We have a very short season, it only extends six months.

Mr. Marshall: Defendant rests.

Mr. Kilroe: We desire to offer in evidence, with the consent of Mr. Marshall, Exhibits A, B, C, D, E, F, G, and H, from pages 30 to 43, in the printed case on appeal of the People of the State of New York against Leo Newman and have it put in this record.

Mr. Marshall: I don't object to it.

The Court: It will be received without objections. Received in evidence.

(Marked People's Exhibit 2 in Evidence.)

[fol. 58] EXHIBIT "C" TO AFFIDAVIT OF JOAB H. BANTON

Copy

In re Theatre Ticket Speculators

Statement of Mr. David Marks, Taken by Mr. Edwin P. Kilroe, Assistant District Attorney, November 13, 1918

I am the president of the United Theatre Ticket Corporation. We are incorporated under the laws of the State of New York and have our main and only office at 1465 Broadway. None of our stockholders are play producers.

We sell considerably over 100,000 tickets a year. Our monthly sales of course vary. In the summer time they run very low. We average from eight to ten thousand a month. In the month of September we sold 7,368 tickets.

Our rent is $7,500 a year, for a long term of years. Our payroll amounts to about $1,800 a month. We have six men actively engaged in selling tickets. The highest salary paid is $60 a week. Besides these six men we have six other employees, four of them being delivery or messenger boys, and a stenographer and a bookkeeper.

About 95% of my business is done on a 50 cents advance basis. The government has investigated us and found that to be the case. Of course some tickets we sell for more than a 50 cents advanced price. Every man in the business has to do that to offset losses. I get stuck on some tickets myself at times.

I have handled opera tickets, but didn't get any bonus on them this year. We did in former years. I am a regular subscriber this year, the same as Tyson or McBride. We pay a bonus on them to the subscribers that we buy from, and then charge a bonus. I have no fixed rule on opera tickets. Most of the time I sell for 50 cents advances. For tonight's and tomorrow night's opera, for instance, I would be glad to sell the tickets for half price. Opera tickets don't sell well unless Caruso or Farrar are the headline artists.

One good show has to carry about five bad shows. There are about 100 shows produced in this city each year. Out of the 100 productions 60 of them are absolute flat failures, 25 of the others are what we call mediocres and the last 15

are successes, about 6 of which are real good successes, and the others are pretty fair. We "buy out" in advance for about fifty of these productions annually. That's blind gamble, because we buy out a certain quantity without even knowing who is in the case. Out of the fifty we have six successes, real successes. Now, we have forty, about forty shows, which entail an absolute loss to us, costing my office alone from $5,000 to $10,000 a year in dead losses, that is, tickets which we couldn't well sell at all or tickets we had to sell at less than what they cost us. Now the six successes must necessarily help us to pay the losses on the other forty bad ones.

In "buy-outs" every agent is called in and told that they are going to produce, for instance, the "Ziegfeld Follies," and it's going to be a grand thing, and all that and they ask each agent how much he wants to get, thus insuring his production for eight weeks.

Usually I take care of seven agents on the "buy-outs" besides tickets for my own office. The largest sum of money I have paid in advance for one production was on the "Ziegfeld Follies" this year. I bought and paid for in advance $40,000 worth of tickets for this production for myself and my seven agents. We have about fifty "buy-outs" [fol. 59] a year.

A "Buy-out" practically insures the success of a show. We have to pledge ourselves to take a certain number of tickets each night for eight weeks, paying the actual cash one or two weeks in advance, renewing some of the "buy-out" pledges. We even have to pay a 25 cent advance on many tickets, and on real successes do not get any returns allowed. On some shows where we pay a 25 cent advance we are allowed a 25% return before 7:30 P. M., Mr. Ziegfeld tried to make us pay a 50 cent advance but we turned him down. We bought from practically every producer.

I refuse to answer your question as to how much it costs to "oil" the treasurers to get good locations. We don't manipulate the treasurers. We get the tickets on buy-outs. The treasurer has nothing to do with that.

The people I buy tickets for beside my own office are (Wesley) Tyson & Bro., 1 West 42nd Street; Louis Cohen, Times Building; Edward Alexander, 41st Street and Broadway; Leo Newman, Broadway and 42nd Street; New York

Ticket Library (Warfield), 212 West 42nd Street; J. L. Marks, 1598 Broadway; Rollman, 111 Broadway, (Trinity Building); and myself—United Theatre Ticket Company, 1465 Broadway.

I am handing you a statement showing the profits I make. I don't even average a fifty cent profit on all my tickets including those sold at high prices.

In London they sell tickets to the agents at a ten per cent discount. If they did that here we could easily live up to a 50 cent limit on profits in selling tickets.

If you will co-operate with the managers and ticket men in this way take three ticket men, three managers, your office, our attorney for our side, an attorney for the managers, and take three threatre goers and sit down and have a conference on the matter you might be able to accomplish much. Let them thrash this out and appoint a committee to investigate our books and then arrive at a fair conclusion as to what ought to be done in all fairness. In this way you could probably accomplish a great deal of good, and I make that as a suggestion to you.

[fol. 60] Exhibit "D" to Affidavit of Joab H. Banton

Copy

[Cover Page of Booklet]

Tel. Bryant 7000. Established 1869

Tyson and Brother—United Theatre Ticket Offices, Inc.

Theatre and Opera Tickets

1494 Broadway, New York City

Do you go to the theatre? If you do, then spend a few seconds reading this booklet.

A few lines of interest to our many patrons, whom we have tried to serve efficiently for over 50 years.

[fol. 61] Copy

[First Page of Booklet]

How often have you been disappointed when you tried to secure front seats for the popular shows, only to told, sorry we are sold out.

How much time have you wasted going from one theatre ticket office to another only to be told, sorry, we are sold out.

How much time have you lost in trying to get the various ticket agencies on the telephone and after your patience was exhausted and your nerves all but shattered, you were told sorry, we are all sold out.

With the population growing larger and the visiting strangers ever filling our city, it is becoming a real problem to get good seats.

Unless you are personally known to some salesman or tip him a dollar or two every time you want good seats, you are usually offered two in the sixteenth row or told, sorry, we are sold out.

If you are hard of hearing or you cannot see in back of the fifth or sixth row, or if you must have the first row, you will find these

[fol. 62] Copy

[Second Page of Booklet]

few lines and others herein mentioned of sufficient interest to get in communication, or sign the enclosed application blank for membership in our (limited) Special Department.

Don't forget that there are at the utmost two hundred desirable seats in each theatre, and no less than ten thousand people are trying to get those seats for each performance.

Just because the theatre is sold out is no reason why you should not be able to get seats.

We are not trying to sell stock of any kind in our company, as no stock is for sale and never has been.

We have been established over fifty-three years.

We are not and never have been connected with any other Tyson Co.

Let us solve your theatre ticket problems.

A special Department has been organized with private telephones for special service to a limited number of members only.

[fol. 63] Copy

[Third and Last Page of Booklet]

Fifty cents advance (50¢) advance (strictly) over the box office price plus your annual membership fee for the privilege of getting real down front seats when you want them.

Let us relieve you of at least one of your burdens.

No charge for delivering tickets to home or office.

No charge for leaving them at the theatre.

No misrepresentation.

Special identification service card.

In other words, do you want, what you want, when you want it? If so, let us get together and talk it over.

Do not wait until too late. Get in first as we can only take care of a limited number.

Address all communications to special service department, Tyson and Brother—United Theatre Ticket offices, Inc.

[fols. 64 & 64a] Exhibit "E" to Affidavit of Joab H. Banton

Copy

Application for Membership in the Special Service Department of Tyson and Brother—United Theatre Ticket Offices, Inc.

New York, —— —, 192-.

I hereby apply for Membership in class — of the Special Service Department of Tyson & Brother—United Theatre Ticket Offices, Inc.

Residence: ——. Residence Tel.: No. —.

Business Address: ——. Business Tel.: No. —.

Firm Name: —— ——.

Occupation: ——.

(Signature:) —— ——.

(Over)

[The following appears on the reverse side of the above card:]

Membership in the Special Service Department of Tyson and Brother—United Theatre Ticket Offices, Inc., is limited and as follows:

	Per annum
Class A (4 tickets for every play produced)	$100.00
Class B (8 tickets for every play produced)	$200.00
Class C (12 tickets for every play produced)	$300.00

The class selected entitles each member to the above numbered tickets in the first eight rows, and as many more seats as desired of the best available tickets on hand at any and all times. (Opening nights, prize fights and operas excepted).

As much advance notice as possible is our only request when ordering tickets.

Fifty cents (50c.) advance over the box office price, plus your annual payment.

Check for one year should accompany application.

(Over)

[fol. 65] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN McBRIDE

STATE OF NEW YORK,
County of New York:

John McBride, being duly sworn, deposes and says:

That he holds the office of Treasurer of McBride Theatre Ticket Offices, Inc.; that its principal place of business is at 71 Broadway, Borough of Manhattan, City of New York, and that the company has a number of branch offices located throughout the Borough of Manhattan, City of New York; that the business in which your deponent is engaged is that of buying and selling theatre tickets and tickets of admission to places of amusement; that this business was established by the Father of your deponent about fifty-two (52) years ago, and has been under his control ever since. That your deponent has been associated with this business

with his Father from the year 1894 to date, a period of thirty-one (31) years.

That at the present time, pursuant to the law enacted in 1922 (Chap. 590 of the Laws of 1922), your deponent has been charging an advance of fifty cents (50¢) above the face price of the ticket stamped thereon. That prior to the enactment of this law it has always been the policy of the McBride Company to charge but fifty cents higher than the box office prices stamped on the tickets. That prior to the enactment of this law, occasionally it was necessary to purchase tickets from other brokers at an advance in price, upon the insistance of the customers of McBride Company, and such customers were always warned in advance that if they insisted on obtaining these tickets it would be necessary for the company to charge an advance of fifty cents over the price paid by the McBride Company in the "open market" to brokers or speculators in these tickets. Since the enactment of the law above mentioned, this practice has been discontinued; that prior to [fols. 66 & 66a] the enactment of the law ninety-eight per cent. (98%) of the business of McBride Company was conducted on a fifty cent increase over box office rates. The exception in the overcharge above-mentioned occurred very rarely.

In the purchasing of theatre tickets it is usual and necessary to purchase for some of them four weeks in advance and pay for them two weeks in advance, but usually only one week in advance.

That your deponent's company is not compelled by theatre managers, or producers to buy any particular number of tickets for shows, but may use their discretion in the purchasing of tickets and the number that they so purchase, consideration being given, of course, by the managers and producers to the requests for purchase by other brokers. The policy of your deponent's company in charging a broker's fee of but fifty cents even prior to the enactment of the law aforementioned has caused the business of the McBride Company to flourish, grow and expand, and has developed it into what is said to be the largest business enterprise of its sort which is now thriving and increasing yearly; that they have found through years of experience in the theatre ticket brokerage business that a

charge of fifty cents per ticket above the price printed upon the ticket is adequate and profitable to the broker.

John McBride.

Sworn to before me this 1st day of October, 1925.
Jno. Biggan, Notary.

[fol. 67] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN L. MCNAMEE

STATE OF NEW YORK,
County of New York, ss:

John L. McNamee, being duly sworn, deposes and says:

That he is the President of Tyson & Co.; that its principal office for the transaction of business is at 148 West 42nd Street, in the County of New York; that the business in which your deponent is engaged is that of buying and selling theatre tickets and tickets of admission to places of amusement; that the said business was established in the year 1859—sixty-six years ago—and is the original Tyson & Co.; and one of the largest theatre ticket brokerage offices in existence. That your deponent has been connected with this busines for the period of fourteen years.

That your deponent's firm charges a price fifty cents (50¢) in excess of the face value of the ticket, in accordance with Chapter 590 of the Laws of 1922, amending the General Business Law of the State of New York; and that, prior to the enactment of said law, it was the policy of your deponent's firm to only charge fifty cents in excess of the price printed on the face of such theatre tickets and tickets for admission to places of amusement.

Purchases for theatre tickets are usually made by your deponent's firm from one to four weeks in advance, and are paid for one week in advance, but mostly paid for daily. That your deponent's firm never purchases tickets for any of the theatrical productions until information is received by it as to the name of the production, the prospective cast, and the success that is has met with, where preliminary performances are given outside of the City of New York, prior

to its being placed before the public in the City of New York.

[fols. 68 & 68a] Where customers and patrons of Tyson & Co. request tickets for particular performances or at particular times or locations in the theatre, and the same are not at hand, the policy of the company is to endeavor to sell tickets to these customers for other performances or other attractions, and no tickets are purchased for such customers in the "open market," so that Tyson & Co. are not compelled, nor do they charge their patrons and customers more than fifty cents (50¢) advance over the price printed on the ticket. Where customers and patrons are especially desirous of obtaining tickets for a particular performance of one of the theatrical productions, and the same are not on hand in the office of Tyson & Co., your deponent's firm endeavors to secure these tickets from other brokers by exchanging tickets on hand for those desired, thus without any increased cost to the customer, the charge to the customer being limited to the fifty cents advance over the price printed upon the ticket.

In the purchasing of tickets for theatrical performances, no pressure is exerted on Tyson & Co. by managers, owners, or other persons in authority in theatres to compel Tyson & Co. to purchase tickets for any particular performance or for any particular number of tickets. Tyson & Co. is permitted to purchase and subscribe for whatever tickets they desire, together with other ticket brokers.

The charging of a brokerage fee of only fifty cents on each ticket under the present law above referred to, and that policy of Tyson & Co. prior to the enactment of that law, has resulted in the development of your deponent's company in business, the said business is now growing and thriving, and the volume of business increasing yearly.

(Signed) John L. McNamee.

Sworn to before me this 2nd day of October, 1925.
Jno. Biggan, Commr. Deeds. N. Y. Co. Clerk's No. 425. Comm. expires Dec. 16/25.

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 70] Before Rogers, Circuit Judge, and Knox and Goddard District Judges

OPINION—December 5, 1925

KNOX, D. J.:

This action was brought under the provisions of section 266 of the Judicial Code of the United States. The object is to obtain an interlocutory injunction restraining the District Attorney of New York County, and the Comptroller of the State of New York, from executing and enforcing Chapter 590 of the Laws of 1922 of the State of New York, insofar as that statute prohibits plaintiff, its officers or agents from reselling, or attempting to resell, or engaging in the business of reselling any tickets, or other evidence of the right of entry, to any theatre, place of amusement or entertainment, at a price in excess of fifty cents in advance of the price printed on the face of such tickets or other evidence of the right of entry. It is also sought to restrain the aforementioned officials from revoking plaintiff's license to engage in the business of selling such tickets, and from enforcing, by suit or otherwise, the penalty named in a bond heretofore given to the State Comptroller as required by statute, and from instituting prosecutions against plaintiff, its agents or servants, for reselling, or attempting to resell any theatre amusement tickets in excess of fifty cents in advance of the price printed thereon.

[fol. 71] This is not the first occasion upon which the statute in question has received judicial attention. A theatre ticket broker named Weller was convicted in the Court of Special Sessions in this City for a violation of that portion of the legislation which forbids the resale of tickets of admission to a theatre or other place of amusement or entertainment by any person, firm, or corporation, without a license. The judgment of conviction was affirmed by the Appellate Division of the State Supreme Court in the first judicial department, 207 App. Div. 337. Upon appeal from the determination there made to the State Court of Appeals,

that tribunal, with one judge dissenting, affirmed the action of the intermediate court, People v. Weller, 237 N. Y. 316.

The matter was then taken to the Supreme Court of the United States, and upon May 25, 1925, that court finally decided the propriety of Weller's conviction, 268 U. S. 319. In so doing, the lawfulness of the price restricting portion of the statute was not decided, the Court holding that the provisions of the statute requiring theatre ticket brokers to give a bond and obtain a license, are separable and workable apart from those restricting the price at which the tickets [fol. 72] may be resold, and that, therefore, the validity of the former is independent of the validity of the latter.

From what has been said, it is apparent that the limitation placed upon the resale price of theatre tickets in the hands of licensed brokers is the real object of complainant's attack. In this respect, it is contended that such portion of the statute, if enforced, would, without due process of law, deprive plaintiff of property rights secured by the federal constitution, and would also deny it the equal protection of the law.

When the Weller case engaged the attention of the Court of Appeals, Justice Lehmann, in speaking of the statute, which is published in the margin, * said:

"The statute has not rendered the (theatre brokerage) business unlawful, but it seeks to confine the business to persons obtaining a license, and to restrict drastically the price at which tickets may be resold. Such restrictions interfere with the liberty of those desiring to engage in that business and are lawful only if imposed by the legislature in the exercise of what has come to be described as the 'police power'."

He went on to declare that the general rule by which the right of a legislature to regulate and fix prices in a par- [fol. 73] ticular instance is to be ascertained, depends upon whether the business affected thereby "is so clothed with a public interest" as to justify reasonably the imposition of regulations calculated to remove abuses, or perhaps to procure benefits, in regard to features which clearly affect the public. Admission was made that the

*Sections 167 to 174, inc., of "General Business Law" of the State of New York, omitted; printed side page 14, ante.

limits within which the rule shall be applied are still somewhat shadowy and indefinite. This is undeniably true, and candor compels the concession that whatever may be said regarding the businesses which shall come within the rule, the ultimate decision in a particular case must rest, in the last analysis, upon little more than the ipse dixit of a court of last resort.

The case of Wolff v. Industrial Court, 262 U. S. 522, 539, aside from the decision upon the facts then before the court, is authority for little else than that the extent to which legislation may regulate the conduct of a business affected by a public interest depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared.

That the business of catering to the entertainment and [fol. 74] amusement of the public is affected with a public interest seems apparent. It has been so recognized from antiquity. As to Greece, see The Theatre of the Greeks by J. W. Donaldson, pages 309, 310; The Attic Theatre by A. E. Haigh, at page 330; The American Cyclopaedia, Volume 15, pp. 685, 686; As to Rome, see Encyclopædia Britannica, Vol XXVI, 11th Ed., page 736.

As to modern times, the public nature of the business is hardly open to argument. That hundreds of thousands of people daily attend theatrical performances, athletic contests, musical recitals, and other forms of amusement and entertainment, is a matter of common knowledge. That an even greater number of the public follows, with keen interest, the displays of strength, skill and ability of various kinds which take place in college and professional stadiums, in theatres and other similar places of resort, is evidenced by the amount of space devoted by the public press to the news of such occurrences and events.

None now denies the right of appropriate authorities to license places of public entertainment and to limit, within [fol. 75] reason, the fire and building hazards to which the public may there be subjected. Supervision and control may also be exercised over performances which offend the public sense of decency, and the legislature may prohibit owners of amusement places from enforcing discriminatory regulations with respect to persons who may seek admission thereto. People vs. King, 100 N. Y. 418; Aaron v. Ward, 203 N. Y. 351,356. By reason of these considera-

tions, as well as others, of a similar nature, theatres, "require more or less of governmental supervision and regulation." People ex rel. Duryea v. Wilber, 198 N. Y. 1, 9. See also Mutual Film Corporation vs. Ohio Industrial Commission, 236 U. S. 230.

Passing, for the moment, the question of the regulatory power which may be exercised over theatres, attention should be directed to a peculiar development that has come about in connection with the production of theatrical offerings. Reference is had to the manner in which ticket brokers have come to finance new attractions. It appears that the procedure is somewhat as follows: A theatrical manager who is about to stage a production calls together [fol. 76] a group of brokers. He informs them of what he has in contemplation and, having done so, inquires as to the number of tickets the brokers will purchase over the first eight weeks of the play's run. While it may be that the show, as yet, has no title, and that the names of the actors who will take part in the production are unknown, the brokers, if they wish to obtain tickets, are required to purchase and make advance payment for a certain number for each presentation of the play that will be given within the first eight weeks of the run. This outlay frequently aggregates as much as fifty or sixty thousand dollars. Should the show not be a success, the brokers have the privilege of returning a negligible number of tickets. But the net result is that a considerable financial loss is borne by the broker.

Under such a state of affairs, it is but natural that tickets for the most desirable seats should pass into the hands of the brokers. The seating capacity of theatres showing popular and successful productions is distinctly limited, and the practice just referred to tends towards a monopolistic control of the ticket business by the brokers. Standing as he does to lose money on an unsuccessful play, the [fol. 77] broker's reasonable course of procedure is to take full benefit of his control of the market for desirable tickets, and to exact from the theatre-going public the largest price per ticket that it can be induced to pay. Nor is there the least assurance that the price obtained from two or more patrons for seats of the same quality will be the same.

No person, at all familiar with theatrical conditions in this city, can say that the legislature, in enacting the statute under attack, was without facts upon which to base its de-

termination that it was desirable from a governmental standpoint, to safeguard the theatre-going and amusement-seeking public against fraud, extortion, exorbitant rates and similar abuses. For many years the evils attendant upon theatre ticket speculation in this community have been recognized, and various efforts, both public and private, have been exerted in an endeavor to minimize or eliminate them. An instance of private effort so to do is recorded in Collister v. Hayman, 183 N. Y. 250, 254. In the decision there rendered, the Court said:

"A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this [fol. 78] kind frequently leads to abuse, especially when the theatre is full and but few tickets are left, so that extortionate prices may be exacted."

Obviously, the opportunity for fraud and extortion is much greater when ticket brokers are permitted to procure a large proportion of the desirable seats for a number of attractions, and are moved not only by the desire to make a fair profit on the tickets they control for particular performances, but are likewise concerned with the purpose of overcoming, at the earliest possible moment, the speculative risk that they have assumed with regard to the success with which the plays may meet over a substantial period of time yet to come.

When such conditions exist, and the legislature realizes that a large portion of the public, unless willing to meet the extortionate and arbitrary demands of a small group of ticket speculators, will be deprived of the right to be entertained, amused and, occasionally, educated by public exhibitions, which should be open to all upon equal terms, we think a regulatory statute such as we have before us is wholly justified.

Notice is taken of the fact that the Supreme Court of California, in Ex parte Quarg, 149 Cal. 79, has said that [fol. 79] "the right to attend a theatre is not so sacred or important in character as to require or justify legislation regulating the price of admission."

Also, that the Supreme Court of Illinois, in People v. Steele, 231 Ill. 340, held that while the legislature of that state had power to regulate a theatre as a place of amusement, and

to require a license fee from persons conducting such business, the exercise of the power could not serve to change the character of the business from one of private character to one impressed with a public interest. Accordingly, legislation, designed to prevent speculation in theatre tickets through their sale at a price above the printed rate, was declared to be unconstitutional and void as being an arbitrary and unreasonable interference with individual right.

On the other hand, the Justices of the Supreme Judicial Court of Massachusetts, in an opinion rendered to the General Court of that Commonwealth, 247 Mass. 589, advised that, if the legislative authority of the state should find that prices and other conditions attending the sale of tickets of admission to theatres, and other public places of amusement requiring a license, are matters affected by a public interest, and that legislation is necessary for the protection [fol. 80] of the public against fraud, extortion and similar abuses in connection therewith, a statute which would provide for a price limit, reasonably calculated to prevent extortion, but affording a reasonable profit to persons engaged in the resale of tickets to public places of amusement, might constitutionally, be enacted.

After giving careful consideration to these opposing decisions, and to others that, in our judgment are pertinent to the question raised by complainant's bill, we are prepared to say that the right of the public to resort to public places of entertainment without being subjected to imposition and oppression at the hands of a small group of persons who control a substantial portion of the limited seating capacity of such places of public entertainment, is as much entitled to protection and preservation as in its right to enjoy less essential advantages and conveniences which are admittedly subject to regulatory legislation. For example, taxicab and omnibus fares have long been the subject of fixation by appropriate authorities. Yet, under conditions as we now know them, such fares affect only those who desire special facilities and conveniences in the way of transportation. Extortionate rates, if charged, [fol. 81] would not deprive a substantial portion of the public of a means of travel to and from their places of residence and business. The ordinary facilities of transportation, would still exist and be available to all upon

equal terms. If, in answer to this statement, it be said that the State's right of regulating public service utilities arising out of special circumstances, and has, as its basis, the grant of privilege conferred by the public, the reply will be that such is not the controlling principle. See People v. Budd, 171 N. Y. 1, 27. And, at no previous time did the Government possess greater power to recognize the interest in a particular business than it does today. German Alliance Insurance Co. v. Kansas, 233 U. S. 389, 411. To a certain extent, the law is a progressive science, Holden v. Hardy, 169 U. S. 366, and as indicative of the fact, it is now held lawful for a state to regulate rates to be charged for insurance contracts, German Alliance Ins. Co. v. Kansas, supra; the hours of labor in mines and underground workings, Holden v. Hardy, supra; the number of hours per day that women may work in laundries, Muller v. Oregon, 208 U. S. 412; the maximum rates to be charged for the loan of money, Griffith v. Connecticut, 218 U. S. 563; the making of assignments of wages for security of debts of [fol. 82] less than $200, Mutual Loan Co. v. Martell, 222 U. S. 225; the making and selling of bread, Schmidinger v. Chicago, 226 U. S. 577; contracts limiting liability for injuries in advance of the injury received, C. B. & Q. R. R. v. McGuire, 219 U. S. 549; and a state may also compel banks within its jurisdiction to contribute to a guarantee fund to protect deposits. Noble State Bank v. Haskell, 219 U. S. 104. These cases mark the development of the principles enunciated in the grain elevator litigation, 94 U. S. 113 and plainly show that State regulation may properly be applied to any business as and when, by circumstances and its nature, it rises from private to public concern. That is exactly what has happened with respect to public exhibitions and performances that are intended to entertain and amuse the public. The State legislature has so declared, and primarily the question is one for such determination. Grundling v. Chicago, 177 U. S. 183. Two of the appellate courts of this State have failed to find that the legislature was in error in its finding. Similarly, they have failed to find that the regulations and price restrictions imposed by the statute constitute an unreasonable and unnecessary interference with either personal or property rights. While the action of the State courts is most per-

[fols. 83-85a] suasive, our own conception of the law, applicable to the facts of the present record, satisfies us that complanant's constitutional rights are in no way invaded by the Statute of which complaint is made. It follows that the prayer for relief must be denied.

December 5, 1925.

Jno. C. Knox, U. S. D. J., for the Court.

[fol. 86] In United States District Court

[Title omitted]

Decree—December 12, 1925

This cause coming on to be heard before Hon. Henry Wade Rogers, Circuit Judge, Hon. Henry W. Goddard, District Judge, and Hon. John C. Knox, District Judge, upon motion of the plaintiff for a temporary injunction restraining the defendant, Joab H. Banton, as District Attorney of the County of New York, State of New York, from proceeding against the plaintiff, its officers or agents, by criminal prosecution, and restraining defendant, Vincent B. Murphy, as Comptroller of the State of New York, from revoking plaintiff's license to resell or engage in the business of reselling any tickets of admission or any other evidences of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held, and exact or receive a price for any such tickets or evidences of [fol. 87] the right of entry in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry, and from enforcing the penalty named in its bond, heretofore filed in the office of said Comptroller, under color of Chapter 590 of the Laws of 1922 of the State of New York, and from bringing directly or indirectly and from permitting to be brought directly or indirectly any proceeding at law or in equity for the purpose of enforcing said statute against the plaintiff, its officers or agents, or any of them, upon plaintiff reselling or attempting to resell or engaging in the business of resell-

ing any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held, or exacting or receiving a price for such tickets or evidences of the right of entry in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry, on the ground that said statute, Chapter 590 of the Laws of 1922, of the State of New York, is unconstitutional and void and each and every section thereof is unconstitutional and void under the Fourteenth Amendment to the Constitution of the United States in that it deprives plaintiff of its liberty and property without due process of law and of the equal protection of the laws;

And after reading the precept and subpœna herein dated August 7, 1925, the bill of complaint, duly verified the 6th day of August, 1925, the motion for a temporary injunction, the affidavits of David Marks duly verified the 6th day of August, 1925, and the 9th day of October, 1925, respec-
[fols. 88 & 88a] tively, the order for hearing application for temporary injunction dated August 12, 1925, the notice of motion for temporary injunction addressed to the Governor of the State of New York and the Attorney General of the State of New York, dated August 13, 1925, in support of said motion, and the answer of defendant, Joab H. Banton, as District Attorney of the County of New York, State of New York, the answer of defendant, Vincent B. Murphy, as Comptroller of the State of New York, the affidavit of defendant, Joab H. Banton, duly verified the 9th day of October, 1925, the affidavit of John McBride, duly verified the 1st day of October, 1925, and the affidavit of John L. McNamee, duly verified the 2nd day of October, 1925, in opposition thereto, and after hearing Louis Marshall, Esq., solicitor for the plaintiff, and Felix C. Benvenga, Esq., solicitor for the defendant, Joab H. Banton, as District Attorney of the County of New York, and Robert P. Beyer, Esq., solicitor for defendant, Vincent B. Murphy, as Comptroller of the State of New York, and due deliberation having been had thereon, it is hereby

Ordered, adjudged, and decreed that the said motion be and the same hereby is overruled on the ground that said statute, Chapter 590 of the Laws of 1922, of the State of

New York, and each and every section thereof, is valid and constitutional and is not in contravention of the Fourteenth Amendment to the Constitution of the United States, and that it does not deprive plaintiff of its liberty or property without due process of law and does not deprive the plaintiff the equal protection of the laws.

Enter.

Henry Wade Rogers, Circuit Judge of the United States. John C. Knox, District Judge of the United States. Henry W. Goddard, District Judge of the United States.

[fol. 89] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME—December 21, 1925

And now comes Tyson and Brother—United Theatre Ticket Offices, Inc., a New York corporation, and respectfully represents:

That on the 14th day of December, 1925, a decree was entered herein at a Stated Term of the United States District Court held in and for the Southern District of New York, pursuant to order of Hon. John C. Knox, a District Judge, dated August 12, 1925, overruling and denying its motion for a temporary injunction restraining the defendant, Joab H. Banton, as District Attorney of the County of New York, State of New York, from proceeding against the plaintiff, its officers or agents, by criminal prosecution, and restraining the defendant, Vincent B. Murphy, as Comptroller of the State of New York, from revoking plaintiff's license to resell or engage in the business of reselling any tickets of admission or any other evidences of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibits, games, contests or performances are held, and from enforcing the penalty named in its bond, heretofore filed in the office of said Comptroller, under color of Chapter 590 of the Laws [fol. 90] of 1922 of the State of New York, and from bringing directly or indirectly and from permitting to be

brought directly or indirectly any proceeding at law or in equity for the purpose of enforcing said statute against the plaintiff, its officers or agents, or any of them, upon plaintiff reselling or attempting to resell or engage in the business of reselling any such tickets of admission or other evidence of the right of entry in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry. The motion to restrain the defendants herein pendente lite was duly made on the ground that Chapter 590 of the Laws of 1922 of the State of New York is unconstitutional and void, and each and every section thereof is unconstitutional and void, under the Fourteenth Amendment to the Constitution of the United States in that it deprives plaintiff of its liberty and property without due process of law and of the equal protection of the laws. The motion was overruled by decree of the United States District Court held in and for the Southern District of New York composed of Hon. Henry Wade Rogers, Circuit Judge of the United States, Hon. John C. Knox, District Judge of the United States, and Hon. Henry W. Goddard, on December 12, 1925, on the ground that Chapter 590 of the Laws of 1922 of the State of New York, and each and every section thereof, is valid and constitutional and is not in contravention of the Fourteenth Amendment to the Constitution of the United States, and on the ground that it does not deprive the plaintiff of its liberty or property without due process of law, and does not deprive the plaintiff of the equal protection of the laws.

And plaintiff respectfully shows that in said record, proceedings and decree in this cause lately pending and brought by plaintiff as aforesaid, manifest errors have in-
[fols. 91 & 91a] tervened to the prejudice and injury of the plaintiff, all of which will appear more in detail in the Assignment of Errors which is filed with this petition.

Wherefore, plaintiff prays that an appeal may be allowed from said decree to the Supreme Court of the United States and that said appeal may be made a supersedeas upon the filing of a bond to be fixed by the Court.

Louis Marshall, Solicitor for Plaintiff.

Office and Post Office Address: No. 120 Broadway, Borough of Manhattan, New York City.

And now, to-wit, on this 21st day of December, 1925, it is ordered that the appeal as prayed for herein be and the same is hereby allowed to the Supreme Court of the United States upon giving bond as required by law in the sum of $250.00.

Jno. C. Knox, District Judge.

A. G. Jr.

[fol. 92] In United States District Court

[Title omitted]

Assignment of Error

Now comes Tyson and Brother—United Theatre Ticket Offices, Inc., a New York corporation, plaintiff in the above entitled cause, by Louis Marshall, its solicitor, and says that in the record and proceedings in the above-named Court (Hon. Henry Wade Rogers, Hon. Henry W. Goddard, and Hon. John C. Knox, sitting), in this cause there is manifest error in this, to-wit:

First. In that the United States District Court held in and for the Southern District of New York in adjudging that Chapter 590 of the Laws of 1922 of the State of New York is a constitutional statute.

Second. In that the United States District Court held in and for the Southern District of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff of his liberty without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Third. In that the United States District Court held in and for the Southern District of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State [fol. 93] of New York did not deprive the plaintiff of its property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Fourth. In that the United States District Court held in and for the Southern District of New York erred in ad-

judging that Chapter 590 of the Laws of 1922 of the State of New York did not deny to the plaintiff the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Fifth. In that the United States District Court held in and for the Southern District of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff, its officers and agents and each of them of its and/or his lawful occupation and livelihood without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Sixth. In that the United States District Court held in and for the Southern District of New York erred in failing to adjudge that Chapter 590 of the Laws of 1922 of the State of New York deprived the plaintiff, its officers and agents and each of them of its and his liberty and property without due process of law, and denied to it and/or him the equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

[fols. 94-98] Wherefore, for these and other manifest errors appearing in the record, Tyson and Brother—United Theatre Ticket Offices, Inc., the plaintiff herein prays that the decree dated the 12th day of December, 1925, and entered in the office of the Clerk of the United States District Court, Southern District of New York, on the 14th day of December, 1925, be reversed and set aside and held for naught, and that a decree be rendered for the plaintiff granting to it its rights under the laws and Constitution of the United States, and particularly granting the motion for a temporary injunction against the defendants, as prayed for herein.

Louis Marshall, Solicitor and Counsel for Plaintiff.

Office and Post Office Address: No. 120 Broadway, Borough of Manhattan, New York City.

[fol. 99] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation by Appellant of Parts of Record to be Printed, with Notice and Proof of Service—Filed January 15, 1926

Sir: Please take notice that the following is a definite statement of points upon which the appellant herein intends to rely upon the appeal herein to the Supreme Court of the United States:

First. The United States District Court held in and for the Southern District of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York is a constitutional statute.

Second. The United States District Court held in and for the Southern District of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff of its liberty without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Third. The United States District Court held in and for the Southern District of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff of its property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

[fol. 100] Fourth. The United States District Court held in and for the Southern District of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deny to the plaintiff the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Fifth. The United States District Court held in and for the Southern District of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff, its officers and agents and each of them of its and/or his lawful occupation and livelihood without due process of law in violation of Section 1

of the Fourteenth Amendment of the Constitution of the United States.

Sixth. The United States District Court held in and for the Southern District of New York erred in failing to adjudge that Chapter 590 of the Laws of 1922 of the State of New York deprived the plaintiff, its officers and agents and each of them of its and his liberty and property without due process of law, and denied to it and/or him the equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Seventh. Chapter 590 of the Laws of 1922 is unconstitutional and void because it deprives the plaintiff of its liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Eighth. The business of selling or procuring tickets of [fol. 101] admission is not affected by a public interest, in the sense that the Legislature may fix the price at which such tickets may be sold by brokers or limit the compensation chargeable by brokers for procuring them.

Ninth. The appellant is entitled to an interlocutory injunction against the District Attorney of the County of New York, State of New York, and the Comptroller of the State of New York, in accordance with the prayer for relief contained in the complaint.

Tenth. The appellant is entitled to a permanent injunction against the District Attorney of the County of New York, State of New York, and the Comptroller of the State of New York, in accordance with the prayer for relief contained in the complaint.

Eleventh. The decree dated December 12, 1925, and entered in the office of the Clerk of the United States District Court, Southern District of New York on December 14, 1925, should be reversed and set aside and held for naught, and a decree should be rendered for the appellant herein granting to it its rights under the laws and constitution of the United States, and particularly granting the

motion for a temporary injunction against the defendants, as prayed for herein.

Dated, January 13, 1926.

Yours, etc., Louis Marshall, Solicitor for Appellant, No. 120 Broadway, Borough of Manhattan, New York City.

To William R. Stansbury, Esq., Clerk of the United States Supreme Court, Washington, D. C.; Felix C. Ben-
[fol. 102] venga, Esq., Solicitor for Respondent Banton, Criminal Courts Building, New York City; Albert Ottinger, Esq., Attorney General of the State of New York, Solicitor for Respondent Murphy, 51 Chambers Street, New York City.

[fol. 103] Due service of within notice is hereby admitted.

Dated City of New York, Jan. 14, 1926.

Felix C. Benvenga, Solc. for Respdt. Banton.

Copy of within paper received Jan. 14, 1926.
Albert Ottinger, Attorney General of the State of New York, Solc. for Respdt. Murphy.

[fol. 104] Sir: Please take notice that the following is a definite statement of the parts of the record herein which appellant thinks necessary for the consideration of the appeal herein:

1. Bill of Complaint and all exhibits annexed thereto.
2. Motion for Temporary Injunction.
3. Affidavit of David Marks, verified August 6, 1925, and all exhibits annexed thereto.
4. Affidavit of David Marks, verified October 9, 1925.
5. Order for hearing application for temporary injunction.
6. Answer of defendant Joab H. Banton, District Attorney of New York County.
7. Answer of defendant Vincent B. Murphy, Comptroller of the State of New York.
8. Affidavit of Joab H. Banton, verified October 9, 1925, and all exhibits annexed thereto.
9. Affidavit of John McBride, verified October 1, 1925.

10. Affidavit of John L. McNamee, verified October 2, 1925.
11. Opinion of Judge Knox for the Court.
12. Decree.
13. Petition for Appeal.
14. Order allowing appeal.
15. Assignment of Errors.

[fol. 105] The printed record should also show that the original record on the file contains:

1. A Precept in due form dated August 7, 1925.
2. A subpœna in due form addressed to the respondents dated August 7, 1925.
3. Notice of Motion for Temporary Injunction addressed to the Governor of the State of New York and to the Attorney General of the State of New York, with proof of service of such notice upon said Governor and Attorney General.
4. Bond on Appeal.
5. Citation.
6. Stipulation agreeing to record.
7. Clerk's Certificate.

Dated January 13, 1926.

Yours, etc., Louis Marshall, Solicitor for Appellant, No. 120 Broadway, Borough of Manhattan, New York City.

To Felix C. Benvenga, Esq., Solicitor for Respondent Banton, Criminal Courts Building, New York City; Albert Ottinger, Esq., Attorney General of the State of New York, Solicitor for Respondent Murphy, 51 Chambers Street, New York City; William R. Stansbury, Esq., Clerk of the United States Supreme Court, Washington, D. C.

[fol. 106] Due service of within notice is hereby admitted.
Dated City of New York, Jan. 14, 1926.

Felix C. Benvenga, Solc. for Respdt. Banton.

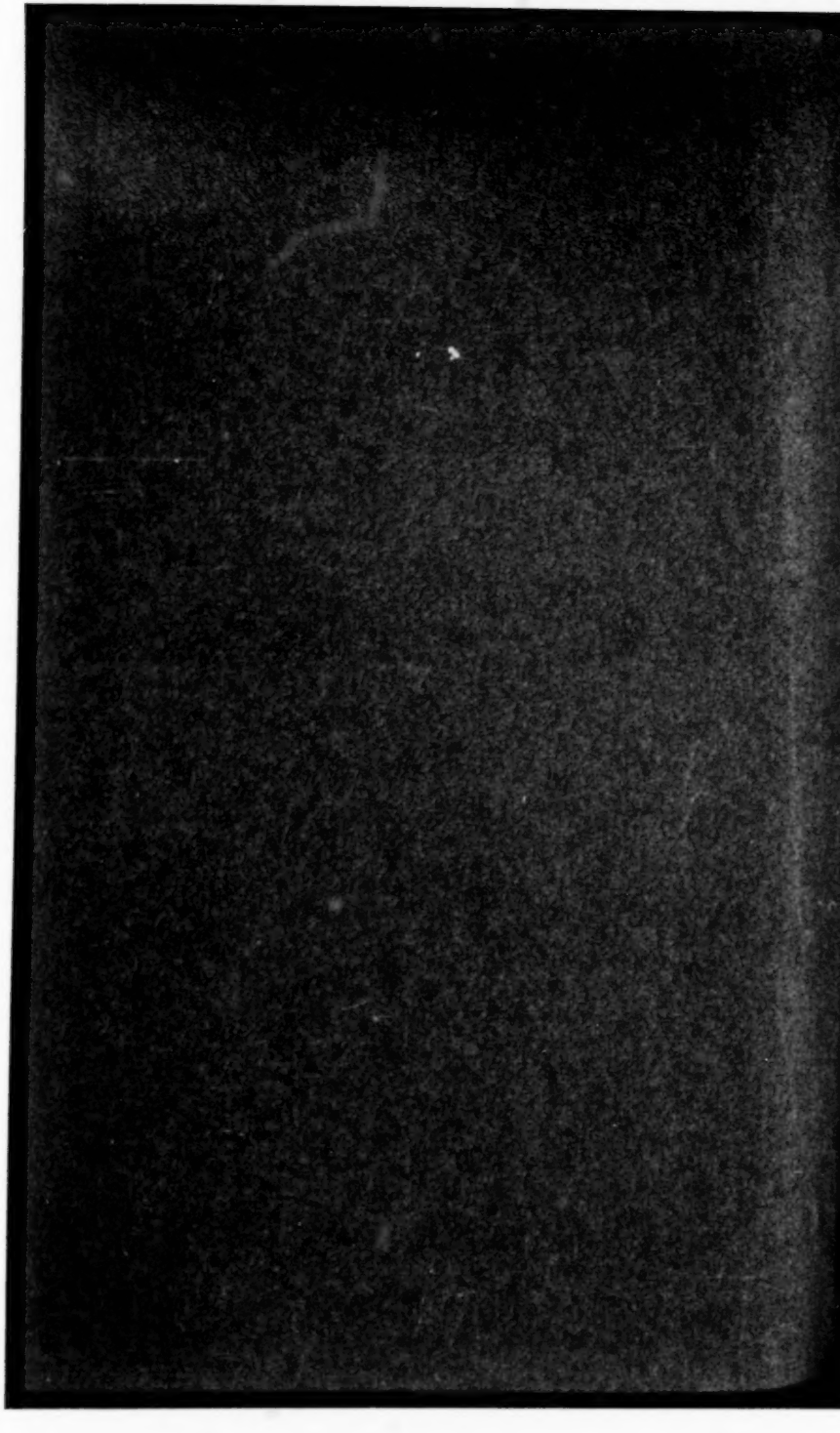
Copy of within paper received Jan. 14, 1926.

Albert Ottinger, Attorney General of the State of New York, Solc. for Respdt. Murphy.

[fol. 107] [File endorsement omitted.]

Endorsed on cover: File No. 31,593. S. New York, D. C. U. S. Term No. 870. Tyson and Brother—United Theatre Ticket Office, inc., appellant, vs. Joab H. Banton, as District Attorney of the County of New York, State of New York, and Vincent B. Murphy, as Comptroller of the State of New York. Filed January 6th, 1926. File No. 31,593.

APPELLANT'S BRIEF



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Supreme Court of the United States

OCTOBER TERM, 1926.

No. 261.

TYSON AND BROTHER–UNITED THEATRE TICKET OFFICES, INC., Appellant, against JOAB H. BANTON, as District Attorney of the County of New York, State of New York, and VINCENT B. MURPHY, as Comptroller of the State of New York.	Appeal from the District Court of the United States for the Southern District of New York.

APPELLANT'S POINTS.

This action was brought pursuant to Section 266 of the Judicial Code, for an injunction restraining the District Attorney of New York County and the Comptroller of the State of New York from executing and enforcing Chapter 590 of the New York Laws of 1922, in so far as that statute prohibits the plaintiff, its officers or agents, from reselling or attempting to resell, or engaging in the business of reselling, any tickets or other evidence of the right of entry to any theatre or place of amusement or entertainment, at a price in excess of fifty cents in advance of the price printed on the face of such tickets or other evidence

of the right of entry. It was also sought to restrain the defendants from revoking plaintiff's license to engage in the business of selling such tickets, from enforcing, by suit or otherwise, the penalty named in the bond theretofore given to the State Comptroller as required by the statute, and from instituting prosecutions against plaintiff, its agents and servants, for reselling or attempting to resell any theatre or amusement tickets at a price in excess of fifty cents over the price printed thereon (*Rec.*, pp. 1-17).

The grounds on which the injunction was sought, as set forth in the bill of complaint, were that the Act in question, in the respects described, is unconstitutional and void under the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiff of its liberty and property without due process of law and denies to it the equal protection of the laws (*Rec.*, p. 7).

The appellant moved for a temporary injunction, and it appearing to the Court that the suit was one which required the presence of three Judges at the hearing of the application, it was duly ordered that the application should be heard before Honorable Henry W. Rogers, Circuit Judge, Honorable Henry W. Goddard, District Judge, and Honorable John C. Knox, District Judge (*Rec.*, pp. 24, 25).

Thereupon such hearing took place and a decree was rendered on December 12, 1925, overruling the motion on the ground that the statute (Chap. 590 of the New York Laws of 1922) and each and every section thereof was valid and constitutional and not in contravention of the Fourteenth Amendment to the Constitution of the United States, and that it did not deprive the plaintiff of its liberty or property without due process of law and did not deny the plaintiff the equal protection of the laws (*Rec.*, pp. 64-66).

For the convenience of the Court, the full text of the Act follows:

The Statute Challenged.

"Sec. 167. *Matters of public interest.* It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.

Sec. 168. *Reselling of tickets of admission; licenses.* No person, firm or corporation shall resell or engage in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held, without having first procured a license therefor from the comptroller. Such license shall be granted upon the payment by or on behalf of the applicant of a fee of one hundred dollars and shall be renewed upon the payment of a like fee annually. Such license shall not be transferred or assigned, except by permission of the comptroller. Such license shall run to the first day of January next ensuing the date thereof, unless sooner revoked by the comptroller. Such license shall be granted upon a written application setting forth such information as the comptroller may require in order to enable him to carry into effect the provisions of this article and shall be accompanied by proof satisfactory to the comptroller of the moral character of the applicant.

Sec. 169. *Bond. The comptroller shall require the applicant for a license to file with the application therefor a bond* in due form to the people of

the state of New York *in the penal sum of one thousand dollars,* with two or more sufficient sureties, who shall be freeholders within the state of New York, *conditioned that the obligor* will not be guilty of any fraud or extortion, *and will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by this article.* The comptroller shall keep books wherein shall be entered in alphabetical order all licenses granted and all bonds received by him as provided for in this article, the date of the issuance of such licenses and the filing of such bonds, which record shall be open to public inspection. A suit to recover on the bond required to be filed by the provisions of this article may be brought by the comptroller or on the relation of any party aggrieved in a court of competent jurisdiction *and in the event that the obligor named in such bond has violated any of the conditions of such bond, recovery for the full penal sum of such bond may be had in favor of the people of the state.*

Sec. 170. *Revocation of licenses.* In the event that any licensee shall be guilty of any fraud or misrepresentation *or shall charge for any ticket a price in excess of the price authorized by this article* or otherwise violate any of the provisions of this article or any other law or local ordinance, *the comptroller shall be empowered,* on giving ten days' notice by mail to such licensee, and on affording such licensee an opportunity to answer the charges made against him, *to revoke the license issued to him.*

Sec. 171. *Supervision of comptroller.* The comptroller shall have the power, upon complaint of any citizen or of his own initiative, to investigate the business, business practices and business methods of any such licensee if in the opinion of the comptroller such investigation is warranted. Each such licensee shall be obliged, on request of the comptroller, to supply such information as may be required concerning his business, business practices or business methods.

Sec. 172. *Restriction as to price. No licensee shall resell any such ticket* or other evidence of the right of entry to any theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are given *at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry.* Every person, firm or corporation who owns, operates or controls a theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are held shall, if a price be charged for admission thereto, print on the face of each such ticket or other evidence of the right of entry the price charged therefor by such person, firm or corporation.

Sec. 173. *Violations; penalties.* Every person, firm or corporation who resells any such ticket or other evidence of right of entry or engages in the business of reselling any such ticket or other evidence of the right of entry, without first having procured the license prescribed *and filing of a bond required by this article* shall be guilty of a misdemeanor. *Every person, firm or corporation who violates any provisions of this article shall be guilty of a misdemeanor.*

Sec. 174. *Constitutionality of article.* In case it is judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of the remaining provisions of the article.

Sec. 2. This act shall take effect immediately."

The Nature of the Service Rendered by Ticket Brokers.

The affidavit of David Marks, which was considered on the hearing and which is uncontradicted, shows that the first theatre ticket agency was organized in New York in 1859 by George I. Tyson. The appellant's business was

established in 1869 by two of Tyson's brothers. Mr. Marks, who is the president of the corporation, has been engaged in the business of a theatre ticket broker for upwards of thirty years (*Rec.*, pp. 17, 18). During all this time the appellant was engaged in the business of reselling tickets of admission or other evidences of the right of entry to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held. During all this time it has performed a useful service for its customers, saving them the time and cost of going to the theatre box offices for their tickets, avoiding for them the waste of time which would be involved in standing in line at box offices, freeing them from the annoyance of finding at one box office that they could not obtain tickets for the night desired and requiring them to go from box office to box office to find tickets for a performance which they desired to attend (*Rec.*, p. 18).

For many years other reputable concerns have been engaged in the same business. It was called into being and has been continued in response to a public demand and has rendered satisfactory service to those who have made use of the facilities afforded by these brokers. These brokers sell approximately 2,000,000 tickets annually. These represent about 50 per cent. of the "downstairs" seats. They do not handle balcony or other of the cheaper seats (*Rec.*, p. 45).

The appellant's business is extensive. It maintains thirty-one telephones and fifty-five private wires connected directly with various theatrical box offices in the City of New York, all for the convenience of its customers. It does a business exceeding $1,500,000 annually, less than 50 per cent. of which represents cash sales. The larger part represents tickets supplied to customers and charged to their accounts, for which monthly bills are rendered. During the last five years appellant has sold on an aver-

age approximately 300,000 tickets annually. Customers call at or telephone to the office of the appellant requesting tickets for a designated performance and for a specified time. If the appellant has the tickets on hand, it sells them to the customer. If it has not, it either tries to purchase tickets for him from another broker or at the theatre or gives him a choice of tickets for another performance or for another night. It often happens that when a customer insists upon obtaining just such tickets as he has called for, the appellant, in order to secure them, is obliged to pay for them a price in excess of that printed on the face of the tickets (*Rec.*, pp. 18, 19, 40). They serve those who are hard of hearing or whose eyesight is bad and who would not be apt to get the accommodations suited to their infirmities at the theatre box office. They also supply tickets to out-of-town customers and to strangers stopping at the various hotels, who otherwise would be unable to secure tickets on short notice (*Rec.*, pp. 41-43).

The persons dealing with the brokers are thus spared the insufferable annoyance and the serious loss of valuable time incident to standing in line at the box offices of the various theatres, to discover eventually that the theatre is unable to supply them with seats in the locations desired, or for the evening suiting their convenience or preference.

The appellant employs salesmen, messengers to deliver tickets at the homes or offices of the purchasers and other places convenient to them, bookkeepers, and other employees. It is obliged to maintain an office in the heart of the theatrical district, centrally located, and large enough to permit of easy ingress and egress to its patrons. It sells no tickets and solicits no business on the streets, all sales taking place at its office (*Rec.*, p. 19). The

average yearly expense of carrying on this service during the last three years has been as follows (*Rec.*, p. 19):

Rent	$24,000
Telephones	5,400
Salesmen	6,380
Messengers	5,200
Carfares	1,500
Cashier	2,280
Porter	1,200
Bookkeepers	10,300
Lighting	1,200
Stationery	1,200
Total	$58,600

Approximately one-half of the tickets dealt in by the appellant are subscribed for by it, frequently before the play has been staged. These subscriptions are made for eight weeks in advance of the delivery of the tickets. Sometimes the theatres charge a premium on the tickets so purchased. One successful performance has to carry about four failures or mediocrities. If the appellant fails to sell the tickets, it is permitted to return not to exceed 25 per cent. of them to the theatre, sometimes less. In 1923 the appellant subscribed for and paid in advance of the opening of various productions 140,500 tickets, for which it paid $540,750.50; in 1924, 127,752 tickets, for which it paid $491,604.15, and from January 1st to July 1, 1925, 81,924 tickets, for which it paid $315,510 (*Rec.*, pp. 19, 20).

In order to finance its business and purchase these tickets in advance, appellant is required to borrow annually large sums, in some years amounting to $75,000, on which it is obliged to pay interest (*Rec.*, p. 20).

When tickets are received by appellant from box offices on consignment, they must be returned by 1.30 P. M. for

matinees and 7.30 P. M. for evening performances, otherwise appellant is required to pay for the tickets even though they may not be taken up by its customers. A substantial number of the tickets received on consignment and all tickets subscribed for in advance of the production remain daily on the hands of the appellant and are a total loss. During the last three years tickets thus undisposed of averaged 18,230, entailing a loss of $70,210. Appellant also sustains losses amounting to at least $5,000 a year as a result of claims made by patrons that they had not ordered tickets reserved for them or that they ordered tickets for a different performance than that for which appellant reserved tickets (*Rec.*, p. 20). The brokers take back from their customers all tickets returned before 8 o'clock in the evening, as a matter of courtesy. If the ticket cannot then be sold, the loss falls on the broker (*Rec.*, p. 43).

When the ticket brokerage business began, the expenses of carrying on an office were infinitesimal compared with the expenses now incurred by the appellant, and at that time the premium charged was an advance of fifty cents over the box office price (*Rec.*, pp. 17, 18).

The testimony given by Mr. Marks on the trial of *People* v. *Weller* in the Court of Special Sessions of the City of New York, made a part of the present record by the respondents, sets forth in more detail the methods by which the business of a ticket broker is carried on, and its usefulness not only to regular patrons and to persons of impaired eyesight and hearing, but also to strangers and to residents of other communities who desire to visit the theatre and who otherwise would be unable to do so (*Rec.*, pp. 34-50).

The Weller Case.

In the case of *Weller* v. *New York*, 268 U. S. 319, decided May 25, 1925, this statute came before this Court for consideration upon a writ of error to a judgment of the Court of General Sessions of the City of New York, entered after successive affirmances by the Appellate Division of the Supreme Court (207 App. Div. 337), Mr. Presiding Justice Clarke and Mr. Justice Finch dissenting, and by the New York Court of Appeals (237 N. Y. 316), Judge Andrews dissenting. There, the plaintiff-in-error was adjudged guilty of reselling theatre tickets without a license, an act which, under Sections 168 and 173 of the statute here under consideration, was declared to be a misdemeanor. The plaintiff-in-error did not question the power of the State to require licenses of those engaging in the business of reselling theatre tickets. It was contended, however, that the price-fixing clauses of the statute, the requirements of the license and the conditions of the bond required to be given by a licensee in order to procure a license, were so intertwined that they were inseparable, and that Weller would, therefore, have been precluded from attacking the price-fixing clauses had he complied with the licensing provisions. As to these propositions this Court said (268 U. S. 324, 325):

> "In an extended opinion the latter court [the Court of Appeals] upheld the challenged enactment, but said nothing of the possibility of sustaining the license provisions if those relating to resale prices were invalid. Counsel for plaintiff-in-error now insists that the two provisions are inseparable; that those which undertake to establish resale prices are clearly invalid; and, consequently, the whole act must fall. On the contrary, counsel for the people maintain that the power of the State to require such licenses is clear and that we need not determine the validity of the price restrictions.

> It is not and, we think, it cannot seriously be urged that the State lacked power to require licenses of those engaging in the business of reselling theatre tickets. The conviction and sentence were for failure to observe that requirement. In the absence of an authoritative announcement of another view by some court of the State we shall hold this provision severable and valid. *Brazee* v. *Michigan,* 241 U. S. 340. The statute itself declares (Sec. 174): 'In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of the remaining provisions of the article.' If Section 172, which restricts resale prices, were eliminated, a workable plan would still remain. See *Dorchy* v. *Kansas,* 264 U. S. 286."

This Court, therefore, did not pass upon the question of the constitutionality of the price-restricting provisions or on the criminal and forfeiture provisions of the statute based upon the price-fixing section. That question alone is now presented for adjudication.

The opinion in the case now under review (which at the time of this writing is not yet reported) is so largely based upon the opinions of the Appellate Division and the Court of Appeals in *People* v. *Weller,* that it is deemed appropriate to analyze those utterances in some detail.

Assignments of Error.

In connection with the appeal allowed to this Court from the decree rendered, the appellant filed the following assignments of error (*Rec.,* pp. 66-69):

> "First. In that the United States District Court held in and for the Southern District of New York erred in adjudging that Chapter 590 of the Laws

of 1922 of the State of New York is a constitutional statute.

Second. In that the United States District Court held in and for the Southern District of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff of his liberty without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Third. In that the United States District Court held in and for the Southern District of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fourth. In that the United States District Court held in and for the Southern District of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deny to the plaintiff the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fifth. In that the United States District Court held in and for the Southern District of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff, its officers and agents and each of them of its and/or his lawful occupation and livelihood without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Sixth. In that the United States District Court held in and for the Southern District of New York erred in failing to adjudge that Chapter 590 of the Laws of 1922 of the State of New York deprived the plaintiff, its officers and agents and each of them of its and his liberty and property without due

process of law, and denied to it and/or him the equal protection of the law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States."

The Statement of the Points to be relied upon on this appeal was filed on January 15, 1926, and is to be found at *Record,* pp. 70, 71.

POINTS.

I.

Chapter 590 of the Laws of 1922 is unconstitutional and void because it deprives the defendant of its liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

That the business of a ticket broker is a lawful one, that the pursuit of it cannot be prohibited, directly or indirectly, and that theatre tickets, constitute property in the constitutional sense of the term, has been expressly adjudicated.

People ex rel. Tyroler v. *Warden of the City Prison,* 157 N. Y. 116.
People ex rel. Fleischmann v. *Caldwell,* 64 App. Div. 46; aff'd 168 N. Y. 671.
People v. *Marks,* 64 Misc. Rep. 679.
Collister v. *Hayman,* 183 N. Y. 250.
Matter of Newman, 109 Misc. Rep. 622.

In the opinion rendered by Judge Lehman in *People* v. *Weller* this is conceded. He says (237 N. Y. 320, 321):

"The business of reselling tickets of admission to places of public amusement has always been re-

garded as a lawful business which serves the convenience and promotes the comfort of persons who desire to purchase at convenient times and places tickets which otherwise they could purchase only at the office established by the management of the places of amusement for the sale of tickets in advance of the performance until the full supply of tickets should be disposed of.

The statute has not rendered the business unlawful, but it seeks to confine the business to persons obtaining a license *and to restrict drastically the prices at which tickets may be resold.* Such restrictions interfere with the liberty of those desiring to engage in that business and are lawful only if imposed by the legislature in the exercise of what has come to be described as the 'police power.' "

Analysis of the Statute.

The central idea of this Act is to prohibit the owner of a ticket from selling it at a price which will be more than 50 cents in excess of the price stamped thereon by the owner of the theatre.

By Section 167 of the statute it is announced that the price of or charge for admission to theatres, places of amusement or entertainments, is a matter affected with a public interest and subject to the supervision of the State, for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses. The draftsman is evidently proceeding on the theory that by means of a mere shibboleth or talismanic formula, that which is essentially a matter of private concern can be metamorphosed from its real character into one of public concern, despite the numerous decisions in which it has been adjudged to the contrary.

The Legislature has made no attempt to regulate the prices charged for tickets of admission by the owners of theatres nor the prices charged by middlemen or retailers in the sale of clothing, drugs or food products or to limit

the price of labor, or of books. It is unreasonable to suggest that "the price of or charge for" theatre tickets is "affected with a public interest" when the Legislature regards the prices of the staples and necessaries of life, the wages of mechanics and laborers, the salaries of corporate officials and employees and the fees of doctors and lawyers as being unaffected by "public interest" or as being beyond the pale of its regulatory power.

Section 169 requires the applicant to file with his application a bond in the penal sum of $1,000 with two or more sureties, who shall be freeholders of the State of New York, *conditioned, among other things, that the obligor "will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by this article"* (referring to Sections 138 and 172). A suit to recover on the bond may be brought by the Comptroller, or on the relation of any party aggrieved, and in the event that the obligor named in such bond has violated any of the conditions of such bond, recovery for the full penal sum may be had in favor of the people of the State.

By Section 170 it is set forth that in the event that any licensee "shall charge for any ticket a price in excess of the price authorized by this article," necessarily referring to Section 172, the Comptroller is empowered to revoke the license on notice and an opportunity to answer the charge.

Section 172, which is the essential provision, with which all of the previous sections are connected by express reference, as above shown, declares:

> "No licensee shall resell any such ticket or other evidence of the right of entry to any theatre, place of amusement or entertainment, etc., *at a price in excess of fifty cents* in advance of the price printed on the face of such ticket or other evidence of the

right of entry. Every person, firm or corporation who owns, operates or controls a theatre, etc., shall, if a price be charged for admission thereto, print on the face of each such ticket or other evidence of the right of entry, the price charged therefor by such person, firm or corporation."

Section 173 makes the violation of any provision of the article a misdemeanor.

We have already said that tickets are property. They are bought and sold. They have a market value. That the business of dealing in tickets is lawful has already been shown. Those engaged in it pursue an occupation of great usefulness. They render a service to that part of the public desiring to attend the theatre or the opera on short notice, that would otherwise be likely to be disappointed in its efforts. They save their patrons the loss of time and the irritation resulting from the delay in being served at the box offices of the theatres to which they desire admission. Strangers who sojourn at the many hotels and who seek for innocent amusement would find it practically impossible at the height of the theatrical season to attend a performance of the character they desire but for these agencies, which are to be found in the principal hotels, or in communication with them. Residents of other cities are enabled, through these brokers, to arrange by telegraph or telephone for the purchase of tickets in anticipation of their coming to the city.

Some of these brokers have been engaged in this business more than fifty years. To serve the public they are obliged to rent expensive offices. Many of them have entered into leases for long terms. They employ assistants and bookkeepers and messengers. It is necessary for them to keep telephones and clerks to operate them so that they may be in communication with their patrons, with the theatres and with the public generally. What they charge is for their services. Each broker has his regular clientele, many of whom have running accounts with the broker, just

as they would with any other kind of middleman through whom they may purchase merchandise or secure service of any kind.

By restricting these brokers in the price that they shall charge for their tickets (which constitute a marketable commodity) or for their service (which is likewise a property right), by depriving them of their liberty of entering into contracts for the sale of such property or the rendition of the services which they are requested and able to render, the due process clause of the Constitution is effectually violated. There is nothing immoral or intrinsically wrong in the business which these men conduct.

That there is nothing inherently wrong in selling tickets or rendering service in connection with the procuring of tickets and making a charge of more than 50 cents in excess of the price marked on the tickets clearly appears not only from the terms of the statute under review, but also from recent congressional legislation concerning the Internal Revenue.

By the Revenue Act of October 3, 1917, Sec. 700 (Fed. Stat. Ann., 1918 Supp., p. 354), a tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place of entertainment or amusement was provided for.

By the Act of February 24, 1919 (40 Stat. L. 1057, Sec. 800; Fed. Stat. Ann., 1919 Supp., p. 158), it was provided that there was to be paid "upon tickets or cards of admission to theatres, operas and other places of amusement sold at news-stands, hotels and places other than the ticket offices of such theatres, operas or other places of amusement at not to exceed fifty cents in excess of the sum of the established price therefor at such ticket offices, plus the amount of any tax imposed under paragraph (1)," which is the normal tax payable by the theatre or other places of amusement under the Revenue Act of 1917, "a

tax equivalent to five per centum of the amount of such excess; and if sold for more than fifty cents in excess of such established price plus the amount of any tax imposed under paragraph (1), a tax equivalent to fifty per centum of the whole amount of such excess."

It was also provided in the same statute that "a tax equivalent to fifty per centum of the amount for which the proprietors, managers or employees of any opera house, theatre or other place of amusement sell or dispose of tickets or cards of admission in excess of the regular or established price or charge therefor" was to be paid.

The provisions last referred to were re-enacted in the Revenue Act of 1921 (Sec. 800, Fed. Stat. Ann., 1921 Supp., p. 191).

> See *Iselin* v. *United States*, decided by this Court on March 1, 1926 (70 S. C., L. Ed. 279), opinion by Mr. Justice Brandeis.

Neither in the Act now under review, nor in any other statute of New York, is there any limitation upon the amount that the proprietor, manager or employee of a theatre or other place of amusement may charge for tickets. Even though Section 172 requires those owning, operating or controlling a theatre to print on the face of the admission tickets issued the price charged therefor, no obligation is imposed on those connected with the theatre to sell the tickets at the printed price or to maintain a uniform price. Nor is there any prohibition against the sale of large blocks of tickets to any person, for resale or otherwise.

Nobody is required to purchase admission tickets to the theatres who does not desire to do so. If the brokers buy tickets in order to supply their customers when there is no demand for them, they are themselves the losers. If the

theatrical attraction proves to be unpopular, to the extent that they have in accordance with the requirements of the theatrical managers invested in tickets for such performance the loss falls upon them and not on the public. Their relation to the theatregoers is in no sense different from that of the haberdasher, the hatter, the dressmaker, the hotel keeper, the commission merchant, the jeweler, the mechanic, the farmer, or the day laborer to those whom they respectively serve. It is no less an infraction of their right to liberty and property than it would be if the men belonging to any of these other categories were to be limited by statute or ordinance as to the price that they are to receive for the merchandise in which they deal or the service which they render. Such legislation savors of the ancient days when the tyrannical Statute of Laborers sought to fix in a rigid mould the compensation that those who labored on the farm and in the workshop were to receive, and of that species of legislation which limited the prices at which the products of the soil and of the industry of the artisan were permitted to be sold.

Ancient Abandoned English Legislative Experiments.

It will be interesting in this connection to refresh one's recollection regarding the Statutes of Laborers enacted 23 and 25 Edward III (1349 and 1350), and the enactments of 5 Elizabeth, c. 4, as to the compensation of handicraftsmen, servants and artificers, and the prices at which farm produce and other merchandise might be sold. They are collated in Chapter I of the monograph by the late Albert Stickney, a prominent member of the New York bar, entitled *"State Control of Trade and Commerce"* (printed in 1897).

Like the present Act these statutes also began with recitals. The first of them proclaimed:

> "Because a great part of the people and especially of workmen and servants late died of the pestilence, many seeing the necessity of masters and great scarcity of servants will not serve unless they receive excessive wages * * * we, considering the grievous incommodities, which the lack especially of ploughmen and such laborers may hereafter cause, have * * * ordained" (p. 10).

The second (pp. 15, 16), referring to the enactment of 1349 as being aimed "against the *malice* of servants * * * not willing to serve after the pestilence without taking excessive wages," declared that it had been ordained "that such manner of servants, as well men as women should be bound to serve receiving salary and wages accustomed in places where they ought to serve in the twentieth year of the reign of the King that now is, or five or six years before, * * * and now for as much as * * * the said servants having no regard to the said ordinance, but to their ease and singular *covetise*, do withdraw themselves to serve great men and other, unless they have livery and wages to the double or treble of that they were wont to take the said twentieth year and before, to the great damage of the great men and impoverishing all of the said commonalty * * * wherefore * * * to refrain the *malice* of the said servants * * * be ordained."

Not only were the acts of the laborers inveighed against, characterized as covetise and malice, but also as "coactions and manifest extortions" (p. 13).

In 1564, Parliament (5 Eliz., c. 4), continuing to make recitals of the same character, with the interpolated concession "that the wages and allowances limited and rated in many of said statutes are in divers places too small and not answerable to this time, respecting the advancement of prices of all things belonging to the said

servants and laborers," still persisted in the tyrannical policy adopted 215 years previously. The terms of this statute are instructive (pp. 24-35).

The very thought makes one shudder that it was declared by statute that a haymaker was to receive but a penny a day, the mower of meadows but five pence for the acre, and the reaper of corn in the first week of August two pence and thereafter three pence, without meat or drink (p. 16); that none should take for threshing a quarter of wheat or rye over two pence and for the quarter of barley, beans, peas and oats one penny (p. 17); that a master carpenter was limited to three pence, a master mason to four pence, and a plasterer to the like amount, without meat or drink (p. 17); that cordwainers and shoemakers shall not sell boots or shoes in any other manner than in the twentieth year of the reign of Edward (p. 18), and that because of the dearth of poultry the price of a young capon should not pass three pence, of a hen two pence, of a pullet one penny, and of a goose four pence (p. 20). The infraction of personal liberty becomes the more significant when it is considered that it was declared that "every person able in body under the age of sixty years, not having to live on, being required, shall be bound to serve him that doth require him or else committed to the gaol until he find surety to serve" (p. 10), and that a violation of these provisions was made punishable with imprisonment (pp. 11, 18, 19). So comprehensive was this legislative scheme that it was enacted (p. 11) "that no man pay, or promise to pay any servant any more wages, liveries, meal or salary than was wont as afore is said."

Can it be seriously contemplated that, in spite of the constitutional guaranties to secure the liberty of the citizen, we are to restore a system of so nefarious a character as that which prevailed in the evil days when such legislation as that described was enacted and attempted to be enforced?

Operation of Statutory Price Fixing.

In the Act now under consideration the right of the ticket brokers to carry on their business and to sell their property and their services in the manner indicated is sought to be curtailed by the mere fiat of the Legislature. The unsoundness of this procedure from the constitutional standpoint is capable of easy illustration. Let us suppose that, instead of relating to theatre tickets, this statute had aimed its shafts at jewelers. Would it be within the purview of the legislative power to say that a licensed jeweler shall not charge more than $1 in excess of the cost to him of a ring supplied to him by a manufacturer, or that he shall sell his diamonds in accordance with a schedule of prices established by the Legislature based upon the charges of the diamond cutters at Amsterdam and London, or of the miner at Kimberly? Again, let us suppose that a licensed vendor of rugs were limited to making sales at a fixed percentage over their cost at Bagdad or in Bokhara, or that a licensed dealer in oil paintings were prohibited from disposing of them at a price exceeding to the extent of $100 that paid to the artist; or, for that matter, that the licensed artist himself were forbidden to sell at a sum exceeding the cost of the canvas, paint, frame, and $5 a day for the time spent in the production of his artistic creation. Could such legislation be upheld? The purchase of luxuries has been instanced because of the similarity between them and tickets of admission to the theatre or the opera.

On the theory of this legislation it would be equally permissible to limit the compensation of journalists and accountants, of clerks and bookkeepers, the wages of shoemakers and tailors, of carpenters and bricklayers, the commissions of factors and brokers and of agents of every imaginable variety. It would likewise enable the Legis-

lature to fix the prices of food and clothing, of books and magazines, of stone and lumber, of iron beams and copper sheathing, of aeroplanes and automobiles, the profit of the newsboy, of the fruit-vendor, of the barber and the boot-black. Illustrations might be multiplied by the thousands, including every branch of industry, agriculture, commerce, or other human activity. In fact, the power of the Legislature would be supreme and everybody, practically, would be placed in a straitjacket.

The whole theory of such legislature is vicious and dangerous, and the precedent that would be created by sustaining the Act now under consideration would be an invasion of liberty, calculated to work lasting injury not only to the individual, but to the public welfare.

The limitations on the power of the Legislature to fix the price of commodities or of services, or to limit the right to contract with regard to them were stated with his accustomed clarity by Judge Andrews in *People* v. *Budd*, 117 N. Y. 15, affd. *sub nom. Budd* v. *New York*, 143 U. S. 517:

> *"In determining whether the Legislature can lawfully regulate and fix the charge for elevating grain by private elevators, it must be conceded that the uses to which a man may devote his property, the price which he may charge for such use, how much he shall demand or receive for his labor, and the methods of conducting his business are, as a general rule, not the subject of legislative regulation. These are a part of our liberty, of which, under the constitutional guaranty, we cannot be deprived. We have no hesitation in declaring that unless there are special conditions and circumstances which bring the business of elevating grain within principles which, by the common law, and the practice of free governments justify legislative control and regulation in the particular case, the Statute of*

1888 cannot be sustained. That no general power resides in the Legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services, or interfere with freedom of contract, we cannot doubt. The merchant and manufacturer, the artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammeled by burdensome and restrictive regulations which, however common in rude and irregular times, are inconsistent with constitutional liberty."

This language was quoted with approval in the opinion of Judge Lehman in *People* v. *Weller* (237 N. Y. 322).

The Minimum Wage Case.

The most recent authoritative decision on this proposition, which though called to the attention of the Courts below, not only in the present case, but likewise in *People* v. *Weller*, was not even dignified with notice, is *Adkins* v. *Children's Hospital*, 261 U. S. 525.

It involved the constitutionality of an Act of Congress which provided for the fixing of minimum wages for women and children in the District of Columbia. A board was constituted representative of employers, employees and the public. Among its duties was that of ascertaining and declaring standards of minimum wages for women in any occupation within the District of Columbia, "and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals." The Act was declared unconstitutional on the ground that the right to contract concerning one's affairs, including that of making contracts of employment and to obtain the best terms

one can as the result of private bargaining, is a part of the "liberty" of the individual protected by the Constitution; that this Act arbitrarily interfered with the freedom of contract, and that even though it had been decided in prior cases that, in respect to labor legislation, special consideration was to be given to the physical qualifications of women, those considerations did not apply to legislation which constituted a statutory determination as to the wages to be paid to women for their services.

Speaking for the majority of the Court, Mr. Justice Sutherland made the following comments (pp. 554, 558, 560), which are fully as applicable here as they were to the statute to which they were directed:

> "It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of protecting themselves as men. *It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect to the price for which one shall render service to the other in a purely private employment where both are willing, perhaps, anxious, to agree,* even though the consequence may be to pledge one to surrender a desirable engagement and the other to dispense with the services of a desirable employee. * * * *In principle there can be no difference between the case of selling labor and the case of selling goods.* If one goes to the butcher, the baker or grocer to buy foods, he is morally entitled to obtain the worth of his money, but he is not entitled to more. If what he gets is worth what he pays he is not justified in demanding more simply because he needs more, and the shopkeeper having dealt honestly and fairly in that transaction is not concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission power to determine the quantity of food neces-

sary for individual support and require the shopkeeper, if he sells to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. * * *

Finally, it may be said that if, in the interest of the public welfare, the police power may be invoked to justify the fixing of a minimum wage, it may, when the public welfare is thought to require it, be invoked to justify a maximum wage. The power to fix high wages connotes by like course of reasoning the power to fix low wages. If in the face of the guaranties of the Fifth Amendment, this form of legislation shall be legally justified, the field for the operation of the police power will have been widened to a great and dangerous degree. *If, for example, in the opinion of future law makers, wages in the building trades shall become so high as to preclude people of ordinary means from building and owning homes, an authority which sustains a minimum wage will be invoked to support a maximum wage for building laborers and artisans, and the same argument which has been here urged to strip the employee of his constitutional liberty of contract in one direction will be utilized to strip the employer of his constitutional liberty of contract in the opposite direction. A wrong decision does not end with itself; it is a precedent, and with the swing of sentiment its bad influence may run from one extremity of the arc to the other."*

Among the cases cited in support of the conclusion reached by the Court were *Adair* v. *United States,* 208 U. S. 174, 175, and *Coppage* v. *United States,* 236 U. S. 14. The language of Mr. Justice Harlan in the first of these cases was quoted by Mr. Justice Sutherland at page 545, as follows:

"The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to

> prescribe the conditions upon which he will accept such labor from the person offering to sell. * * * In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

Mr. Justice Sutherland then quoted from the opinion of Mr. Justice Pitney in the second of these cases (pp. 545, 546), as follows:

> "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority have no other honest way to begin to acquire property, save by working for money."

The constitutionality of the Act was ineffectually sought to be sustained by the decisions in *Wilson* v. *New*, 243 U. S. 322; *Block* v. *Hirsh*, 256 U. S. 135, and *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170, and *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U. S. 242. These cases were distinguished by Mr. Justice Sutherland (pp. 551, 552) on the ground that the legislation there attacked was temporary in its operation and was passed to meet a sudden and great emergency because the parties affected for the time being *could or would not agree;* while in the case under consideration, as well as in the present case, *the parties were forbidden to agree. At least, one of the*

parties was penalized, however anxious the other of the parties may have been to agree upon a basis of compensation prohibited by the statute.

The Court then referred to the decision in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 416, where Mr. Justice Holmes, after saying:

> *"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change,"*

added:

> *"The late decisions upon laws dealing with the congestion of Washington and New York; caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law, but fell far short of the present act."*

Other Applicable Decisions.

In *Adams* v. *Tanner,* 244 U. S. 590, an Act which forbade employment agents from receiving fees from workers for whom they found places, was held to violate the due process clause of the Fourteenth Amendment, because it in effect destroyed their occupation as agents for workers, the business of securing such work for the unemployed in return for an agreed consideration being regarded as a useful and legitimate business. In the course of his opinion Mr. Justice McReynolds said:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But

this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked. The general principles by which the validity of the challenged measure must be determined have been expressed many times in our former opinions. It will suffice to quote a few.

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, we held invalid a statute of Louisiana which undertook to prevent a citizen from contracting outside the State for insurance on his property lying therein because it violated the liberty guaranteed to him by the Fourteenth Amendment. The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The following quotations from other decisions are pertinent:

> "The right to buy, sell, barter and exchange property is a necessary incident to its ownership, and, subject to reasonable regulations, is as much protected by this provision of the Constitution as is the ownership itself."
>
> *City of Carrollton* v. *Bazzette,* 159 Ill. 283; cited with approval in
> *People ex rel. Moskowitz* v. *Jenkins,* 202 N. Y. 53.

> "Every one has the right to adopt such means to sell his goods and conduct his business as he finds most profitable to him, provided those means are honest, and the fact that some persons engaged in the same business are dishonest does not justify legislation prohibiting either directly or indirectly the business."
>
> *People ex rel. Moskowitz* v. *Jenkins, supra.*
> *People ex rel. Tyroler* v. *Warden,* 157 N. Y. 116.

> "Restraint by statute and restraint by contract are quite different. What the parties to a contract agree upon is valid almost without limitation, but what the Legislature may prohibit parties from agreeing upon is subject to the limitation of the fundamental law."
>
> *Collister* v. *Hayman,* 183 N. Y. 250.

In *Fisher Co.* v. *Woods,* 187 N. Y. 90, a section of the Penal Code which provided that in cities of a certain class persons offering for sale real property without the written authority of the owner were guilty of a misdemeanor, was declared unconstitutional. In the course of his opinion Judge Haight said:

> "The business of a real estate agent or broker or of any person who engages his services to an owner

> of real estate to hunt up or procure a purchaser, through advertisements or otherwise, is perfectly lawful and legitimate, and persons engaged in that business are entitled to as full a protection of their rights under the Constitution as that of any other person engaged in any of the other professions, trades or occupations. It may be that there are dishonest persons engaged in the business of real estate agents, but it is equally true that dishonest persons are found in every occupation."

In *Producers Transportation Co.* v. *Railroad Commissioners,* 251 U. S. 230, which related to the operation of a pipe line for the transportation of oil, Mr. Justice Van Devanter said:

> "It is of course true that if the pipe line was constructed to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the State could not, by mere legislative fiat or by any regulating commission, convert it into a public utility or make its owner a common carrier, for that would be taking private property for public use without just compensation which no State can do consistently with the due process clause of the Fourteenth Amendment."

In *Michigan Public Utilities Commission* v. *Duke,* 266 U. S. 570, it was held that an Act making persons engaged in transportation of persons or property by motor vehicle on public highways common carriers violated the due process clause as applied to a private carrier engaged exclusively in transporting property for certain concerns under contracts with them. Mr. Justice Butler said:

> "Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for

public use without just compensation, which no state can do consistently with the due process clause *of the Fourteenth* Amendment. Producers Transportation Company v. Railroad Commission, 251 U. S. 228, 230; Wolff Co. v. Industrial Commission, 262 U. S. 522, 535."

In *Frost* v. *California Railroad Commission,* 46 Sup. Ct. Rep. 605, decided June 7, 1926, it was held that even the power of a State to grant a privilege on such conditions as it sees fit to impose is limited, so that it may not impose conditions requiring the relinquishment of constitutional rights.

Decisions Relating to Prices of Theatre Tickets.

It is unnecessary, however, to discuss at length the philosophy of legislation of this character, since carefully adjudicated cases have denied the existence of the power of the Legislature to fix the price of theatre tickets.

People v. *Newman,* 109 Misc. 622.

Ex parte Quarg, 149 Cal. 79, 5 L. R. A., N. S. 183.

People v. *Steele,* 231 Ill. 340, 14 L. R. A., N. S. 361.

City of Chicago v. *Powers,* 231 Ill. 531, 83 N. E. Rep. 240.

People v. *Weiner,* 271 Ill. 74, L. R. A. 1916, C. 775.

Chicago v. *Netcher,* 183 Ill. 104, 48 L. R. A. 261.

In *People* v. *Newman* (*supra*), the reasoning of which was approved and referred to by Governor Miller in 1921, *in support of his veto of a similar bill, as being "so cogent as to permit no other conclusion,"* Justice Rosalsky declared unconstitutional Section 11-a, Article I, Chapter 3 of the Code of Ordinances of the City of New York, which prohibited the resale of theatre tickets at a price greater than 50 cents in excess of the sum printed thereon, and which permitted the revocation of a license to sell tickets in the event of a resale in excess of that sum. The comprehensive opinion evinces so exhaustive and painstaking a study of the subject that it is earnestly commended for consideration. It is believed that it will be found helpful.

In *Ex parte Quarg, supra,* Mr. Justice Shaw said:

> "It is perhaps, not important in this case to consider and define the precise nature of a theatre ticket. It may be either a mere license, revocable at the will of the proprietor of the theatre, or it may be evidence of a contract whereby, for a valuable consideration, the purchaser has acquired the right to enter the theatre and observe the performance, on condition that he behaves properly. These are matters which concern only the proprietor and the purchaser. No third person can question the right of the purchaser. However, by the act of 1893 (Stat. 1893, Chap. 185, page 220), a ticket of admission to a public place of amusement, when sold, is made, at least, an irrevocable license to the purchaser of the ticket to occupy a place therein during the performance. Greenberg v. Western Turf Assn., 140 Cal. 360, 73 Pac. 1050. Such a ticket, therefore, represents a right, positive, or conditional, as the case may be, according to the terms of the original contract of sale. This right is clearly a right of property. The ticket which represents that right is also, necessarily, a species of property. As such, the owner thereof, in the absence of any

condition to the contrary in the contract by which he obtained it, has the clear right to dispose of it, to sell it to whom he pleases and at such price as he can obtain. The statute in question forbids any sale for a price higher than that at which it was sold by the proprietor of the theatre; and to that extent it infringes upon the right of property guaranteed by the Constitution and existing in the individual. It is therefore a void enactment, unless it can be upheld as an exercise of the police power.

The police power is broad in its scope, but it is subject to the just limitation that it extends only to such measures as are reasonable in their application, and which tend in some appreciable degree to promote, protect, or preserve the public health, morals or safety, or the general welfare. The prohibition of an act which the Court can clearly see has no tendency to affect, injure, or endanger the public in any of these particulars, and which is entirely innocent in character, is an act beyond the pale of this limitation; and it is therefore not a legitimate exercise of police power. The sale of a theatre ticket at an advance upon the original purchase price, or the business of reselling such tickets at a profit, is no more immoral, or injurious to public welfare or convenience, than is the sale of an ordinary article of merchandise at a profit. It does not injure the proprietor of the theatre; he must necessarily have parted with the ticket at his own price and upon his own terms before such resale can be made. It does not injure the second buyer; he must have had the same opportunity as the first buyer to purchase a similar ticket, and no greater right thereto; and, having neglected that opportunity, or being unwilling to undergo the necessary inconvenience, and willing to pay a higher price rather than forego the privilege which the other by his greater diligence and effort has obtained, the transaction is just as fair as he is concerned."

In *People* v. *Steele, supra,* Mr. Justice Dunn said:

"The statute prohibits the sale of a theatre ticket at a price above the printed rate, and prohibits the establishing of an agency for such sale. There is nothing immoral in the sale of theatre tickets at an advance over the price at the box office. Such sale is not injurious to the public welfare, and does not affect the public health, morals, safety, comfort or good order. It does not injure the buyer or the proprietor of the theatre. The buyer purchases voluntarily. He is under no compulsion. If the conducting of a theatre is a mere private business, there is no reason why the proprietor may not sell the tickets when and where, at what prices, and on what terms, he chooses. It is insisted, however, that the operation of a theatre is a business affected with a public interest, and therefore is subject to control by the legislature. It is a well-established doctrine that, where the owner of property has devoted it to a use in which the public has an interest, he, in effect, grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good, so long as such use is maintained. * * * The fact that a license is required does not make the business a public employment. The cases where a business has been regarded as affected with a public interest have been cases where the person or corporation engaged in the business was acting under a franchise, or cases affecting trade and commerce, where either there has been a virtual monopoly of means of transportation or methods of commerce; or, where, from the nature of the business, in its regular course, the person carrying it on was necessarily entrusted with the property or money of his customers; * * *

The act prohibits the sale of a ticket by the manager of a theatre without the requirement on its face that it shall not be resold at an advance. It prohibits the sale of a ticket at an advance, and it prohibits the keeping of a place for such sale.

> If the manager finds it profitable to have tickets on sale at different places, he may not sell at the regular price to brokers who maintain offices at such places and get their expenses and profits out of the advance in price on their resale of the tickets. The broker's business is prohibited, because it has been made unlawful to make a profit. The public is no better nor worse off in health, morals, security, or welfare. These are arbitrary and unreasonable interferences with the rights of the individuals concerned. The business of the broker in theatre tickets is no more immoral or injurious to the public welfare than that of the broker in grain or provisions. If he does not make the price satisfactory to intending purchasers, they are under no compulsion to buy. They have no right to buy at any price except that fixed by the holder of the ticket. The manager may fix the price arbitrarily, and may raise or lower it at his will. Having advertised a performance, he is not bound to give it, and having advertised a price, he is not bound to sell tickets at that price. It is immaterial to determine whether a theatre ticket is either transferable or revocable. The fact is that the bearer of the tickets is admitted to the performance. The business of dealing in theatre tickets is carried on to some extent, at least, and the right to do so and to contract in regard to such rights is a right in which those who use it are entitled to be protected."

The subsequent decision of the Supreme Court of Illinois in *People ex rel. Cort* v. *Thompson*, 283 Ill. 87, is fully considered *infra* under Point III, pp. 62-65.

In this connection we will consider *Opinion of the Justices*, 247 Mass. 589, 143 N. E. Rep. 808, which is relied upon by the respondents. That was an advisory opinion in answer to questions propounded by the Massachusetts Senate, which at the time had under consideration a bill in most respects similar to the Act here under discussion. The questions as to which advice was sought were as to

whether the General Court, "if it finds that prices and other conditions attending the sale of tickets of admission to theatres or other public places of amusement, requiring a license under Section 181 of the General Laws, are matters affected with a public interest, and that legislation is necessary for the purpose of safeguarding the public against fraud, extortion, exorbitant rates, and like abuses in relation thereto," may "constitutionally enact legislation: (a) Requiring that the price at which such tickets may be sold shall be printed on the face thereof? (b) Requiring that no ticket shall be sold or resold at a price in excess of that printed on the face thereof? (c) Requiring that the business of reselling such tickets, commonly known as 'ticket scalping,' may be subjected to reasonable regulation under the police power? (d) Requiring that such business shall be licensed? (e) Requiring that the price at which tickets are resold by persons engaging in such business shall be stamped upon the ticket? (f) Imposing a limit, reasonably calculated to prevent extortion, but affording a reasonable profit, on the resale price of such tickets by persons engaging in such business?"

Questions (a), (c), (d), (e) and (f) were answered in the affirmative, and question (b) in the negative. The Court asked to be excused from answering the further question: "Would such bill, if enacted, be constitutional?"

Considering the opinion rendered, it is to be observed: (1) This opinion was not delivered in a contested litigation. Apparently there was no argument of counsel either for or against the legislation. It is evident, however, that the Court had before it the opinion in *People* v. *Weller,* 237 N. Y. 316, and in large part based its advice upon that decision.

> "This opinion, however, was advisory in character, given by the justices as individuals, without the

benefit of argument, and was not an adjudication by the court and the rule of *stare decisis* does not apply to it."

Young v. *Duncan,* 218 Mass. 346, 106 N. E. Rep. 1, 4.
Green v. *Commonwealth,* 12 Allen 155, 164.
Opinion of Justices, 7 Pick. 125, 130, 126 Mass. 566, 214 Mass. 599, 604.

(2) It was pointed out that the questions were considered on the footing that the General Court "will find or has already found that the subject with which the statute deals is affected with a public interest and that the proposed statute is necessary for the protection of the public against fraud, extortion and similar abuses in the sale of tickets of admission to theatres and other places of public amusement." This is illustrated by the comment: "Such determination is not conclusive that the proposed regulation is justified. The nature and extent of the public interest and of the exertion of the police power touching it are always a subject for judicial inquiry," citing, among other cases, *Chas. Wolff Packing Co.* v. *Industrial Court,* 262 U. S. 522, 536.

(3) It was then stated that the right to maintain theatres and other places of public amusement is not natural and inherent. We cannot acquiesce in that observation. Even primitive man, in a crude form, indulged in theatrical mimicry and spectacular and dramatic instincts. In ancient Greece and Rome the drama reached a high state of development and the taste for athletic contests was extensively indulged. In the Middle Ages, moralities, miracle, passion and mystery plays were quite generally presented in churches and monasteries. In almost every civilized country by common accord every form of stage

production flourished, from pantomimes, melodramas, farces, and acrobatic performances to the noblest achievements of the human intellect. It was not until later periods that theatres and plays were made the subject of regulation. While it is true that, in the Colonial and the early provincial days of Massachusetts, theatrical entertainments were forbidden, that was by no means a general practice. Such prohibitory legislation was short-lived. Licensing for purposes of revenue and the adoption of regulations in the interest of public morals, health and safety were, however, quite generally resorted to.

We have never questioned the power of the State to license and regulate theatres, as clearly appears from the opinions in the *Weller* case, *supra*. That does not involve the power to prohibit them either directly or indirectly. To-day the right to maintain a theatre is entirely lawful, and in our view of the authorities there has been no adjudication which has undertaken to declare that it is within the competency of a legislature to fix the rates chargeable by the owner or lessee of a theatre for the privilege of attending a performance therein. To do so, would amount to virtual confiscation.

(4) The statute now under review, as well as the bill under consideration by the Justices of the Supreme Judicial Court of Massachusetts, did not even undertake to limit the charges for admission to a theatre. It merely sought to limit the price charged on a resale of a ticket by a broker or the charge for services rendered by him for securing a ticket, to 50 cents above the price printed on the ticket. The owner of a theatre might, therefore, have charged $25 as the price of admission. Yet by this legislation the person reselling the ticket is arbitrarily limited to an additional charge of 50 cents, regardless of the value of his services and the expense of carrying on his business.

the demand for the tickets and the readiness of the purchaser to pay a higher charge. If a license was required, the theatre issuing the ticket was presumptively duly licensed. The playhouse, it may likewise be presumed, complied with the building requirements as to health and safety. The performance must have conformed with good morals. And yet the person lawfully acquiring a ticket who resells it is the only one who is sought to be limited as to the compensation to be received for the ticket sold or for the services rendered in procuring the ticket—a matter entirely beyond any reasonable exercise of the police power.

(5) As has already been noted, the Justices in the opinion cited declared that the Legislature could not constitutionally enact legislation requiring that no ticket shall be sold or resold at a price in excess of that printed on the face thereof. That amounts to saying that the owner of the theatre could not be forbidden to sell a ticket at any price that he desires, whether that price be printed on the ticket or not. That being so, why should a ban be placed on the right of a ticket broker to charge more than the amount fixed by the Legislature? His customer is not compelled to pay more, and makes no complaint.

(6) The expression used in the opinion that the business of conducting a theatre is affected with a public interest, and that the business of a ticket broker is likewise such a business, is, we submit, an untenable position, for the reasons fully discussed in *Chas. Wolff Packing Co.* v. *Industrial Court,* and other cases herein cited. Even in that connection the Justices said:

> "The circumstance that a business is affected with a public interest does not make legally possible every legislative regulation. All such regulations must be reasonable in their nature, directed to the

prevention of real evils and adapted to the accomplishment of their avowed purpose. Under the guise of protecting the general welfare there cannot be arbitrary interference with business or irrational or unnecessary restriction. * * *

Manifestly no statute by attempting to outlaw a natural right can deprive one of the opportunity to earn his livelihood. The rights to labor and to do ordinary business are natural, essential and inalienable, partaking of the nature both of personal liberty and of private property. * * * It was held in *People* v. *Steele*, 231 Ill. 340, and *Ex parte Quary*, 149 Cal. 79, that a prohibition of a resale of such tickets at an advance over the price printed on the face of the tickets was unconstitutional because it made criminal the doing of a reasonable kind of business.

Instances of the establishment of prices by public authority in connection with any business except that of common carriers and those requiring use of the public ways, although affected with a public interest, are not common."

(7) The opinion proceeds to state that a ticket of admission to a place of amusement is a revocable license and that commonly a license is a personal privilege and not transferable. Here there is no question as to the transferability of the tickets acquired by the brokers, or as to the lawfulness of a resale. The theatre owner knows that they are acquired for resale and consents to the resale. The only question to be considered relates to the validity of a statute limiting the profit on a resale, or confining the compensation for procuring a ticket to 50 cents per ticket.

(8) The opinion then refers to usury laws and laws relating to the charges of pawnbrokers for the loan of money. As to these laws it is declared that they are to be upheld only in the light of the common law history of interest for the use of money. It would have been more

accurate to have said that they are based upon the doctrines laid down in the ecclesiastical courts, which adopted the biblical ideas as to the exaction of interest.

Interest is the creature of statute (*Pierce* v. *United States*, 255 U. S. 398), and is emphatically not of common law origin. The taking of interest was looked upon, from the earliest days, with disfavor. It was prohibited by the Mosaic law. It was forbidden by the "Twelve Tables" of ancient Rome. It was penalized under the English law. The Bible is replete with passages condemnatory of the taking of interest. Coke, in 3 *Institutes* 150, referred to it as "being forbidden by the law of God, a sinne and detestable." Domat and Pothier ranked all interest as usury and condemned it (*Tyler on Usury*, 44). The Church forbade the taking of interest, and the State imposed forfeiture upon those who exacted it. It was not until 1545 that it was for the first time sanctioned by 37 Henry VIII, Chapter 9. The early Colonial acts on the subject were modeled after the statute of 12 Anne, Chapter 16, and the usury statutes in force in the several States are mere re-enactments or modifications of the Colonial laws.

In *National Bank of Commonwealth* v. *Mechanics National Bank*, 94 U. S. 438, Mr. Justice Swayne succinctly said:

> "By the common law, interest could in no case be recovered. As early as the reign of King Alfred, in the ninth century, it was held in detestation. Churchmen and laymen alike denounced it. Glanville, Fleta and Bracton all speak of it in terms of abhorrence. The first English statute upon the subject was the 37 Henry VIII, c. 9. This statute fixed the lawful rate of interest at ten per cent. per annum, and visited receiving more with forfeiture and imprisonment. Other statutes regulating the subject were passed in later reigns from time to

time, until finally an act of Parliament in 1854, 17 & 18 Vict., c. 90, swept all the usury laws in the English statute books out of existence, and established 'free trade in money.' The first impulse to public opinion in this direction was given by Bentham, near the close of the last century. The final result was largely due to his labors."

In *Rensselaer Glass Factory* v. *Reid,* 5 Cowen 608, Senator Spencer said:

> "It seems to be the better opinion (Hawkins, book 1, chap. 82) that by the ancient common law, it was absolutely unlawful to take any kind of interest or usury, as it was then called, for money. * * * Hume, in his 33rd chapter, says, 'In 1546 a law was made for fixing the interest on money at ten per cent., the first legal interest known in England. Formerly all loans of that nature were regarded as usurious. The preamble of this very law treats the interest of money as illegal and criminal.' Mr. Jefferson, in a letter to Mr. Hammond, which will be found in the 1st vol. of American State Papers, 307 (1st edition), says, that 'In England all interest was against law, until the statute of 37 Henry VIII, chap. 9, 'which is the statute referred to by Hume. And he furnishes the strongest reasons for confidence in his correctness, by the statement of a fact, that interest is still considered unlawful in all Roman Catholic countries."

See also:

Gray v. *Bennet,* 3 Metc. 522.
Dunham v. *Gould,* 16 Johns. 367.
Houghton v. *Page,* 2 N. H. 42.
Mason v. *Callender,* 2 Minn. 350.
Kermot v. *Ayer,* 11 Mich. 181.
Adriance v. *Brooks,* 13 Tex. 279.

There is no historical identity or sound legal analogy between the theory on which usury laws are based and the legislation as to which the advisory opinion was rendered or that which is now under consideration. We contend that the history of the theatre affords no precedent for a limitation of the compensation to be received by a ticket broker for the sale of or the procuring of a ticket of admission to a theatre, such as that now challenged.

(9) The opinion likewise refers to decisions permitting the regulation of the rates for hackney carriages and those of common carriers and so-called public service corporations. The fact that they are common carriers is a complete answer, and the decision in *Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S. 252, which is cited, admirably points out the distinction between the business of a common carrier and that which does not partake of that character.

(10) The provisions of the Massachusetts Workmen's Compensation Act regulating the fees of attorneys and physicians (*Gritta's Case,* 241 Mass. 525; *Panasuk's Case,* 217 Mass. 589, and *In re Huxen,* 226 Mass. 219), which are cited in the opinion, are not applicable. The statute provided a new and special remedy for the relief of employees injured in the course of their employment. The ascertainment of the amount to be received by the person injured was left to the determination of the Industrial Accident Board. The compensation of attorneys and physicians for services rendered in connection with the proceedings was an incident to the determination of the compensation to be received by the person injured.

Moreover, the relation between the attorney or physician and the client or patient is highly fiduciary in its nature, and, therefore, justified these protective features of the

statute which dealt with a helpless class, who needed protection against their inexperience and improvidence, and in a sense were looked upon as in a state of tutelage.

(11) Finally, it is quite significant that the Justices assert that in advising as to the constitutionality of proposed statutes they "do not rely in this connection upon cases like *Munn* v. *Illinois,* 94 U. S. 113, and *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389, which rest upon more extreme ground, and we confine ourselves strictly to the questions here propounded."

It is difficult to understand how the cases referred to "rest upon more extreme ground" than the statute now under consideration. If it is sought to be intimated that the Justices would be unwilling to follow those decisions, then it would seem to be demonstrated that the conclusion reached is untenable.

II.

The business of conducting a theatre and consequently of selling or procuring tickets of admission is not affected by a public interest, in the sense that the Legislature may fix the price at which such tickets may be sold by brokers or limit the compensation chargeable by brokers for procuring them.

This general subject was luminously treated by Mr. Chief Justice Taft, speaking for a unanimous Court in *Charles Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522. That case involved the validity of a statute creating a court invested with the power to summon the parties and hear any dispute over wages or other terms of employment in any of the designated industries, and which provided that if it should find the business

and health of the public imperiled by such controversy, to make findings and fix the wages and other terms for the future conduct of the industry. In that case the packing company was engaged in slaughtering hogs and cattle and preparing the meat for sale and shipment. *A controversy arose respecting the wages which it was paying to its employees. The Court made findings, including one that an emergency existed, and an order as to wages was made increasing them over the figures to which the company had shortly before reduced them. The statute declared various industries, among others (1) the manufacture and preparation of food for human consumption; (2) the manufacture of clothing for human wear, and (3) the production of any substance in common use for fuel, each of them infinitely more vital than the purveying of amusement, "to be affected with a public interest."* It was nevertheless held that the Act was unconstitutional because it deprived both employer and employee of liberty without due process of law.

The case is especially important because of the commentary to be found in the opinion of Chief Justice Taft, on the formula that a business is "affected by a public interest." He first classifies (p. 535) the businesses as to which it has been said that they are clothed with a public interest justifying some public regulation, as follows: (1) those carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any part of the public, such as railroads, other common carriers and public utilities; (2) certain occupations, regarded as exceptional, as, for example, the keepers of inns, cabs and grist mills, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings; and (3)

businesses which though not public at their inception may be fairly said to have risen to be such and to have become subject in consequence to some governmental regulation. The opinion then continues (pp. 536, 537, 538, 539, 540, 543, 544):

> "It is manifest from an examination of the cases cited under the third head *that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified.* The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.
>
> In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well-being of the people. The public may suffer from high prices or strikes in many trades, *but the expression 'clothed with a public interest,' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered.* The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn* v. *Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.
> • • •
>
> *It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent parliament did regulate prices and wages as it chose, and occasionally a colonial legislature*

sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances. * * *

In nearly all the business included under the third head above, the thing which gave the public interest *was the indispensable nature of the service* and the exorbitant charges and arbitrary control to which the public might be subjected without regulation. * * *

To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. * * *

If, as, in effect, contended by counsel for the State, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley in characterizing a similarly extreme contention. *Civil Rights Cases,* 109 U. S. 3, 24. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment.

This brings us to the nature and purpose of the regulation under the Industrial Court Act. The avowed object is continuity of food, clothing and

> fuel supply. * * * The employer is bound by this act to pay the wages fixed *and while the worker is not required to work, at the wages fixed,* he is forbidden, on penalty of fine or imprisonment, to strike against them and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him. * * *
>
> The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce, furnishes no precedent for the regulation of the business of the plaintiff in error whose classification as public is at the best doubtful. It is not too much to say that the ruling in *Wilson* v. *New,* went to the border line although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster. Certainly there is nothing to justify extending the drastic regulation sustained in that exceptional case to the one before us.
>
> We think the Industrial Court Act in so far as it permits the fixing of wages in plaintiff in error's packing house is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law."

This decision was followed in *Dorchy* v. *Kansas,* 264 U. S. 286, 289, where the business involved and declared to be affected with a public interest was the mining of coal.

When *Charles Wolff Packing Co.* v. *Industrial Court* came here the second time (267 U. S. 552), the doctrine originally laid down was redeclared and extended.

Authorities Relied Upon by the State.

Our opponents, driven to the proposition that the busi ness conducted by ticket brokers is affected by a publi interest, rely upon a line of decisions some of which ar considered in the opinion just cited and none of whic have anything in common with the present case.

They all relate to a business which involved an admit tedly public interest, as, for example, the business of common carrier, an inn-keeper, or a similar or equivalen occupation, especially that of a public service corporatio or one whose right to carry on business depends entirel upon legislative authority.

Such was *Munn* v. *Illinois*, 94 U. S. 113. It related t the regulation of elevators for the storage of grain, business having, for all practical purposes, the character istics of that of a common carrier, and, therefore, affecte with a public interest. As was said by Mr. Chief Justic Waite:

> "Property does become clothed with a public in terest when used in a manner to make it of publi consequence and affect the community at large When, therefore, one devotes his property to a us in which the public has an interest, he, in effect grants to the public an interest in that use."

It was there shown that the business of the warehouse men, who were carrying on their operations in Chicago and to whom this statute related, was so conducted tha every bushel of grain that came into the city paid toll for its passage, which was a common charge. The elevators stood in the very gateway of commerce and too toll from all who passed. The entire public therefore had

a direct and positive interest in the business which in every aspect of it was indispensable to the public welfare.

In the present case there is no such element as that considered in the grain elevator case just referred to. Ticket brokers are engaged in a private business. Nobody is called upon to deal with them who does not desire to do so. They may refuse to serve the public generally. They may at will suspend their business. They have no interest in the theatres to which the tickets confer admission. They lawfully acquire the tickets which they sell to or which they procure for their customers. Their business is no more public than that of any other kind of broker or agent or of any merchant.

German Alliance Ins. Co. v. *Kansas*, 233 U. S. 389, is similar to *Munn* v. *Illinois*. There the business sought to be regulated was that of fire insurance. That was shown to be a business that had been regulated for many years in all parts of the country. In fact, it cannot be carried on at all without legislative authority. It was conceded to be one affecting the public welfare. Insurance was looked upon as being an assimilation to a tax. A large part of the country's wealth subject to uncertainty of loss through fire was recognized as being protected by insurance. This was regarded as a demonstration of the interest of the public in the business. Mr. Justice McKenna after referring to these features of the business, said:

> "To the contention that the business is private we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect

with the instances. The contracts of insurance ma
be said to be interdependent. They cannot be r
garded singly, or isolatedly, and the effect of the
relation is to create a fund of assurance and credi
the companies becoming the depositaries of th
money of the insured, possessing great power ther
by and charged with great responsibility. Ho
necessary their solvency is, is manifest. On th
other hand to the insured, insurance is an asset,
basis of credit. It is practically a necessity to bus
ness activity and enterprise. It is, therefore, e
sentially different from ordinary commercial tran
actions, and, as we have seen, according to the sens
of the world from the earliest times—certainly th
sense of the modern world—is of the greatest pu
lic concern. It is, therefore, within the princip
we have announced. * * * The principle we appl
is definite and old and has, as we have pointed ou
illustrating examples. And both by the expressio
of the principle and the citation of the example
*we have tried to confine our decision to the regul
tion of the business of insurance, it having becom
'clothed with a public interest, and therefore su
ject to be controlled by the public for the commo
good.'*"

Attention is also called to the dissenting opinion of M
Justice Lamar, in which Mr. Chief Justice White and M
Justice Van Devanter concurred, as indicating the lim
tations on the power to fix prices, which were recognized
although deemed inapplicable by the majority of the Cou
to the subject of insurance for the reasons above quote

It has been argued that this case is similar to *Bloc*
v. *Hirsh*, 256 U. S. 135, 154; *Marcus Brown Holding C*
v. *Feldman*, 256 U. S. 170; *Edgar A. Levy Leasing Co.*
Siegel, 258 U. S. 242, and *People ex rel. Durham Realt*
Co. v. *LaFetra*, 230 N. Y. 429. These cases proceed upo
an entirely different principle, namely, that an emergenc
existed which made it necessary for the State to interfe

temporarily, and not permanently, in the interest of pul
health. It was contended that there was a dearth of ho
ing facilities, which, in the absence of legislative pro
tion to those in the occupation of dwellings, would subj
thousands of families to exposure in inclement weath
deprive them of a roof over their heads, and thus endan
the health and lives of a considerable part of the c
munity. This legislation was considered exceptional, a
great care was taken to make it clear that it should
be regarded as a precedent in normal times.

This is shown by the opinion of Mr. Justice Holmes
Pennsylvania Coal Co. v. *Mahon,* 260 U. S. 293, 416,
which we have already referred and from which th
was but one dissent.

See also:

Adkins v. *Children's Hospital* (*supra*).

In *Terminal Taxicab Co.* v. *District of Columbia,*
U. S. 252, 256, the case likewise involved the regulat
of a taxicab business which provided service at railr
stations and hotels. It was held that, in so far as
business which was sought to be regulated by the Pul
Utilities Commission of the District of Columbia rela
to the public use of the plaintiff's taxicabs, the regulat
thereof was lawful; *but as to that portion of its busi*
which consisted mainly in furnishing automobiles fr
its central garage on orders by telephone, it was h
that the regulation was not authorized. Mr. Jus
Holmes thus expressed the views of the Court:

> "Although I have not been able to free my m
> from doubt, the Court is of opinion that this p
> of the business is not to be regarded as a pu
> utility. It is true that all business, and for

matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that consideration is not conclusive, *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 407, it is assumed that such a calling is not public as the word is used. In the absence of clear language to the contrary, it would be assumed that an ordinary livery stable stood on the same footing as a common shop, and there seems to be no difference between the plaintiff's service from its garage and that of a livery stable."

In *Yellow Taxicab Co.* v. *Gaynor*, 82 Misc. Rep. 94, affd. 159 App. Div. 893, 212 N. Y. 97, the ordinance involved related to the regulation of taxicabs. The Charter gave express power to the Board of Aldermen to provide for the licensing and otherwise regulating the business of hackmen and cabmen, including the regulation of the rates of fares. The business was unquestionably that of a common carrier, and consequently was subject to the same power of regulation as that of a railroad or a ferry, and has been so regarded from time immemorial.

Schmidinger v. *Chicago*, 226 U. S. 578, merely involved the question as to whether an ordinance, enacted under express legislative authority, fixing standard size of bread loaves, was valid. That was regarded merely as an exercise of the police power intended to prevent deceit, and practically of the same character as that of fixing weights and measures. It did not undertake to go beyond that point.

This decision was materially modified in *Burns Baking Co.* v. *Bryan*, 264 U. S. 505.

Rast v. *Van Deman & Lewis,* 240 U. S. 342, which related to a special tax on trading stamps, proceeded on the theory set forth by Mr. Justice McKenna, at page 365, and which has no application here:

> "The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a 'lottery,' may not be called 'gaming'; it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry and of judgment that it is finally within the power of the Legislature to make."

In *People ex rel. Armstrong* v. *Warden,* 183 N. Y. 226, the validity of certain provisions of the Employment Agency Act was considered. It was held that in order to prevent frauds and to suppress immorality it was lawful for the Legislature to regulate the keeping of employment agencies. The license fee imposed by the statute was the sum of $25 annually in cities of the first and second class, to which alone the Act related. The legislation clearly came within the police power of the State. Judge O'Brien said:

> "The Legislature had the right to take notice of the fact that such agencies are places where emigrants and ignorant people frequently resort to obtain employment and to procure information. The relations of a person so consulting an agency of this character with the managers or persons conducting it are such as to afford great opportunities for fraud and oppression, and the statute in question was for the purpose of preventing such frauds and, probably, for the suppression of immorality."

The limitation of the power of the Legislature to regulate the compensation of employment agencies was, as has been shown, fully considered by this Court in *Adams* v. *Tanner*, 244 U. S. 590.

Theatres Are Not Within the Theory Invoked.

That even a theatre, and *a fortiori*, those who are engaged in the business of selling tickets entirely outside of the theatre, do not come within the purview of the doctrine on which the State relies, is apparent from the decisions in *Collister* v. *Hayman*, 183 N. Y. 250; *People ex rel. Burnham* v. *Flynn*, 189 N. Y. 160; *Aaron* v. *Ward*, 203 N. Y. 355, and *Woolcott* v. *Shubert*, 217 N. Y. 212.

In *Collister* v. *Hayman* (*supra*) the question arose as to whether the owner of a theatre on issuing tickets could condition their validity by providing that if sold by the purchaser on the sidewalk they would be refused at the door. It was contended that this condition was opposed to public policy and that the theatre owner had no right to make it a part of his contract with purchasers. This contention was rejected. In the course of his opinion Judge Vann said:

> "The defendants were conducting *a private business* which, even if clothed with a public interest, *was without a franchise to accommodate the public, and they had the right to control it the same as the proprietors of any other business*, subject to such obligations as were placed upon them by the statute hereinafter mentioned. Unlike a carrier of passengers, for instance, with a franchise from the State and hence under obligation to transport any one who applies and to continue the business year in and year out, the proprietors of a theatre can open and close their place at will and no one can

make lawful complaint. *They can charge what they choose for admission to their theatre. They can limit the number admitted. They can refuse to sell tickets and collect the price of admission at the door.* They can preserve order and enforce quiet while the performance is going on. They can make it a part of the contract and a condition of admission, by giving due notice and printing the condition on the ticket, that no one shall be admitted under twenty-one years of age, or that men only or women only shall be admitted; or that a woman cannot enter unless she is accompanied by a male escort, and the like. *The proprietors in the control of their business may regulate the terms of admission in any reasonable way. If these terms are not satisfactory no one is obliged to buy a ticket or make the contract."*

Further on in the opinion Judge Vann says:

"This is not a case involving the liberty of the plaintiff to sell his property, for he could sell it to any person and in any place, except in the one prohibited by the contract which constituted the property. The contract did not interfere with his absolute freedom of action except to this limited extent duly agreed upon in advance, while he attempts to interfere with freedom of contract on the part of the defendants by restraining them from enforcing an agreement which they had made and to which he had assented. *Restraint by statute and restraint by contract are quite different. What the parties to a contract agree upon is valid almost without limitation, but what the Legislature may prohibit parties from agreeing upon is subject to the limitations of the fundamental law.* * * * This case involves not a statute but a contract, which excludes no one from carrying on the business of selling theatre tickets, but simply prevents a sale thereof on the sidewalk in violation of the express stipulation of the tickets themselves."

People v. *King,* 110 N. Y. 418, also relied upon by the State, was cited and distinguished in the opinion of Judge Vann, whose comment was:

> "This has no bearing upon the resale of tickets in violation of a contract made with the original purchaser. It was especially designed to prevent the exclusion from 'places of public accommodation or amusement,' of anyone on account of race, creed or color, and apparently was also intended to prevent any discrimination founded on rank, grade, class or occupation. The contract and tickets in question did not discriminate against any person on account of any reason named in the statute, for the same condition is imposed upon all and all are treated alike."

In *Burnham* v. *Flynn, supra,* the relator, a theatrical manager, was committed on a warrant charging him with conspiracy to exclude from the theatres of New York City one Metcalf, a dramatic critic, because of malicious, scurrilous and unjustifiable attacks upon the Jewish patrons of the theatres, which tended to injure the business of the theatres. In the course of the opinion, which held that no crime had been committed, Judge Edward T. Bartlett said:

> "The remaining question in the case is whether the proprietor of a theatre has a right to decide who shall be admitted to witness the plays he sees fit to produce in the absence of any express statute controlling his action. At this late day the question cannot be considered as open in this State. There are a number of cases arising out of the purchase of theatre tickets from speculators on the sidewalk after notification by the proprietor that the same will not be honored at the door. * * * These cases illustrate the absolute control that the proprietor of a theatre exercises over the house and the audience. *He derives from the State no authority to*

> *carry on his business, and may conduct the same precisely as any other private citizen may transact his own affairs.*"

To the same effect is the language of Chief Judge Cullen in *Aaron* v. *Ward, supra.*

There the plaintiff purchased a ticket and took her position in a line of defendants' patrons leading to a window at which the ticket entitled her to receive upon its surrender a key admitting her to its bath-house. When she approached the window a dispute arose between her and the defendants' employees as to the right of another person not in the line to have a key given to him in advance of the plaintiff. As a result of this dispute the plaintiff was ejected from the defendants' premises, the agents of the latter having refused to furnish her with the accommodations for which she had contracted. It was held that, regardless of whether or not the defendants were originally bound to admit the plaintiff to the bath-house, she was nevertheless entitled to recover for the indignity inflicted upon her by the acts of the defendants' servants. All that the Court said regarding theatres was that the business is not "strictly" private.

In *Woolcott* v. *Shubert, supra,* the plaintiff was a dramatic critic who was arbitrarily excluded by the defendant from his theatre and sought an injunction to restrain the continuance of such exclusion. Holding that the action would not lie, Judge Collin said:

> "The acts of the defendant were within their rights at the common law. At the common law a theatre, while affected by a public interest which justified licensing under the police power or for the purpose of revenue, *is in no sense public property or a public enterprise; it is not governed by the rules which relate to common carriers or other*

> *public utilities.* The proprietor does not derive from the State the franchise to initiate and conduct it. *His right to and control of it is the same as that of any private citizen in his property and affairs. He has the right to decide who shall be admitted or excluded.* His rights at the common law, in the respect of controlling the property, entertainments and audience, have been too recently determined by us to be now questionable."

People ex rel. Cort v. *Thompson*, 283 Ill. 87, is discussed *infra*, on pp. 62-65.

The business of conducting a theatre being thus shown to be essentially a private business, is not affected with a public interest in the sense that it is within the legislative power to fix the price of tickets of admission whether sold by the owner of the theatre or by one acquiring ownership from the proprietor of the theatre of the ticket or by one who renders the service of procuring the ticket for one desiring to visit the theatre. The mere fact that the Legislature has seen fit so to say that it is "affected with a public interest" does not alter the fact. It would be recognized at once as a legal absurdity for the Legislature to declare the business of a tailor, of a shoemaker, or of any other craftsman, or of any mechanic, industrial or agricultural workman to be affected with a public interest. In like manner, to declare that a dry goods merchant or a clothing merchant or a grocer is engaged in such a business would be considered startling, when one considers the consequences which this statute seeks to deduce from such a declaration. That is precisely what was ineffectually attempted to be done in *Charles Wolff Packing Co.* v. *Court of Industrial Relations* (*supra*), approved in *Chastleton Corporation* v. *Sinclair*, 264 U. S. 547.

Legislatures are not omnipotent. They cannot by their pronouncement change the inherent nature of things—

make white—black; or night—day; or bitter—sweet. They can no more alter facts than that a man can increase his height by taking thought.

The relations between the public and these craftsmen, mechanics or merchants are of a more vital nature than those of the purchaser of a theatre ticket with the theatre owner, or with one dealing in theatre tickets or rendering service in connection with the procuring of such tickets for those desiring to attend a performance. Should it be suggested that one rendering service in connection with the purchase of a necessary of life is engaged in a business clothed with a public interest, it would at once be answered that all the legislative declarations in the world could not, under our constitutional system, permit the law-making body on the basis of such a declaration, to undertake to fix the compensation for the service rendered or to determine the price for which the article in relation to which the service is rendered, is to be sold. If it could be done with respect to a theatre ticket, it could with equal right apply to the purchase or sale of real or personal property of any kind whatsoever, and an era of paternalism would follow compared with which the legislation of the days of Edward III, and of Elizabeth, would have been innocuous.

If the owner of a theatre may sell tickets of admission to it to any person and on any terms that he may see fit, *or even refuse to sell,* it necessarily follows that one who sells tickets which he has lawfully acquired or procured from the owner of a theatre has an equal right.

The contention that the price of theatre tickets has been increased in recent years and that such increase is attributable to the ticket broker, is not only inaccurate but is entirely beside the question. The owner of the theatre

may close his doors whenever he desires to do so. There is nothing to prevent him from charging for admission whatever he is disposed to charge and he has always availed himself of that right. When Shakespeare, Burbage and their associates conducted the Globe Theatre they charged as high as half a crown for some of the seats. That was more than three centuries ago. If a play proves popular the owner usually increases his admission charge. If he secures great artists, that fact is reflected in the price of tickets. It is well known that on holidays and on Saturday nights practically every theatre in New York advances the prices of its tickets of admission, sometimes doubling the price. The increased expense of maintaining a theatre, the tax imposed by the Federal Government on theatre tickets, and even on the amounts realized by ticket brokers on the sale of tickets or for services rendered to their customers in procuring them, as well as the universal law of supply and demand, together with the diminished purchasing power of the dollar, have determined the price of tickets. Similar factors have affected the prices of practically every commodity, not merely of luxuries, but of the necessaries of life.

III.

An analysis of the opinions of Judge Lehman and Mr. Justice Martin in People v. Weller.

(1) In both of these opinions, *People ex rel. Cort Theatre Co.* v. *Thompson*, 283 Ill. 87, 119 N. E. Rep. 41, is cited. On examination, that case will be found to reaffirm the doctrine of *People* v. *Steele; City of Chicago* v. *Powers* and *Ex parte Quarg, supra,* which were distinguished from the facts there under consideration.

It involved the validity of an ordinance which applied solely to the owners of theatres. They were required to procure licenses. The ordinance also provided that every ticket of admission to a theatre shall have printed upon its face the price thereof, and that no licensee, namely, the owner of a theatre, and no officer, manager or employee of any licensee, shall directly or indirectly receive any consideration, of any nature whatsoever, upon the sale of any such ticket beyond or in excess of the price designated thereon, or directly or indirectly enter into any arrangement or agreement for the receipt of such consideration.

The Theatre Company was refused a license to conduct a theatre because it had failed to comply with this ordinance. In the defendant's answer to the petition for a writ of peremptory mandamus, it was alleged, and on demurrer by the relator was admitted, that various proprietors of theatres, including the relator, issued tickets of admission to the performances given in their places of amusement on which were printed the prices of the tickets, which were also advertised in the public press, but in truth and in fact the relator and such other proprietors had arrangements and agreements with various ticket brokers and scalpers by which a large number of such tickets were placed in the hands of such brokers and scalpers and sold for prices in advance of the price printed thereon, and the excess above such price printed on the tickets was divided between the brokers and the proprietors, the tickets being sold at higher prices for the joint benefit of the brokers and the proprietors.

In the opinion rendered, Mr. Justice Cartwright said:

> "The question to be determined is whether, in granting a license to conduct a place of public

amusement subject to regulation and the police power, a provision that the licensee shall not enter into an arrangement with ticket brokers or scalpers under which the licensee and the ticket brokers or scalpers both represent that the ticket brokers or scalpers are independent dealers and owners of tickets, when in reality they are not owners, but confederates, and the ticket brokers or scalpers sell the tickets at higher prices for the joint benefit of the licensee and themselves, and by means of falsehood and misrepresentation that all tickets to a performance have been sold a portion of the public are required to pay higher prices for the same accommodations than others, is an invasion of rights guaranteed by the State and Federal Constitutions."

In the course of the discussion it is stated:

"No ticket broker or scalper is concerned with this suit, and none is represented by the appellee, and if the ordinance merely prohibits the innocent business of ticket brokers the appellee will not be harmed. The argument, however, concerning the right of ticket brokers to buy and sell tickets and the right of the appellee to sell to them is an effort to raise a false issue in no manner involved in the question whether the court erred in sustaining the demurrer to the answer. The answer alleged that the license was refused because appellee would not agree to obey the requirement of the ordinance for impartial treatment of ticket buyers and to stop the practices set forth in the answer. There is nothing in the answer about purchasers of tickets, whether brokers or not, or their right to resell tickets at a profit. The manifest object of the ordinance is to compel impartial treatment of all buyers of tickets by the licensee. It is so interpreted by counsel for the appellants. The corporation counsel in his brief and argument says: *'The purchaser of such tickets, so far as this ordinance is concerned, may resell them at an advanced price or do anything else with them which he may desire*

> *to do.'* Considering the whole ordinance with its evident purpose, it does not prohibit sales to brokers or any other class of persons, but is designed to prevent theatre owners from entering into such arrangements as are stated in the ordinance."

Referring to this decision, Judge Lehman, in *People* v. *Weller* (237 N. Y. 325), says:

> "Whether the public character of the places of amusement pointed out in this decision is in itself sufficient to give the Legislature power to control the prices which may be charged by the proprietor of places of public amusement has not even been considered by us, for the present statute does not attempt to fix the price which may be charged by the proprietor, but merely requires him to 'print on the face of each such ticket or other evidence of the right of entry the price charged therefor' by him. No theatre proprietor is now challenging that provision, so we are not called upon to express any opinion concerning its validity, though a similar provision in an ordinance of the City of Chicago was sustained in the case of *People* v. *Thompson, supra.*"

We have already shown the purpose which led to this requirement in the Chicago ordinance. It was in no sense intended to limit the price which the broker who actually owned the theatre ticket could charge for it.

The Court likewise refrained from deciding that a person who assumed to furnish tickets of admission to the public had subjected himself to the control of the Legislature in regard to the price which he might demand for the ticket. At least that is the plain intendment of the sentence beginning at the bottom of page 325 of Judge Lehman's opinion.

(2) Apparently the opinion of the Court of Appeals revolves around the succeeding sentence, where Judge Lehman says:

> "The Legislature has, however, pointed out that the statute is enacted 'for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses,' and we may profitably consider in the first place whether 'extortion' or exorbitant prices exacted by oppression, instead of fixed by free agreement, is not the real abuse which the Legislature is seeking to remedy, and, if so, whether the Legislature has the power to remedy the abuse of 'extortion' by price regulation" (p. 326).

It may be useful to call attention, by way of parenthesis, to the similarity between the denunciatory terms *"fraud, extortion, exorbitant rates and similar abuses,"* as quoted from the Act under review, and the terms *"coercise, malice, coaction* and *extortion,"* used in the Statutes of Laborers, *supra*. In both these terms are made the pretext for price fixing.

The learned Judge concedes that the word "extortion" is not used in the sense in which it is employed in the New York Penal Law (Sec. 850). It is suggested that the Legislature intended by that word to refer to "the exaction of money made possible because of oppressive conditions or circumstances, as distinguished from the receipt of money as a result of free negotiations and willingly paid for a service or commodity" (p. 326).

It is significant, however, that, regardless of the pronouncement contained in Section 172 of the Act, which relates to the restriction of price, there is not a word in the enactment itself which deals with or defines extortion, fraud or exorbitant rates. They are mere epithets—a legislative calling of names and making of faces—and therefore futile (*Fogg* v. *Blair,* 139 U. S. 127; *Kent* v.

Lake Superior Canal Co., 144 U. S. 91; *United States* v. *Cohen Grocery Co.*, 255 U. S. 89-91). It merely prohibits a ticket broker from reselling a ticket "at a price in excess of fifty cents in advance of the price printed on the face of the ticket." So far as the statute is concerned, the resale of a ticket at such advance may be the result of free negotiations and may have been willingly paid for the ticket or for the service rendered by the broker in procuring the ticket for the purchaser. Indeed, even if the latter requested the broker to act for his accommodation in order to secure a seat specially suitable to his needs, so that there could be no possible question of the exaction of money by oppressive conditions, the statute none the less makes the act of the broker in selling the ticket at an advance of more than fifty cents above the printed price, a misdemeanor.

The New York Court of Appeals recognized the difficulty of its position, as is shown by the following excerpt from an address recently delivered by Chief Judge Hiscock of that Court, before the Association of the Bar of the City of New York (New York Law Journal, September 6, 1924):

> "The most recent decision of the Court upholding a police regulation was the one giving the stamp of approval to the statute regulating the business of brokers engaged in selling theatre tickets and for which there was great demand in New York City. That decision is liable to be misunderstood unless considered with some care. It did not uphold the statute in question as a statute fixing the price of theatre tickets, but on the ground that the sale of tickets by brokers intimately connected with theatres, which have long been held to be subject to regulation, was so controlled and conducted that it was liable to be productive of fraud and extortion in the purchase of tickets, and that therefore it might be properly regulated."

When analyzed, the opinion, in fact, upheld the statute as a price-fixing law, because, stripped of all verbiage, it is that and nothing else. There was nothing to show the existence of fraud or extortion, or anything in relation to the control or conduct of the business of ticket brokers productive of fraud or extortion, either "in the purchase of tickets" or in the sale of them, which justified the "price fixing" feature of the statute.

(3) At page 328, Judge Lehman instances the ancient statutes against "engrossing" and "forestalling" as being "essentially examples of such legislative mandates" as the law now in question is claimed to be.

The statute is, however, significantly devoid of any such suggestion. There is no reference to engrossing or forestalling, in words or effect, directly or indirectly. However innocent of such a purpose the broker may be, however useful his service to the purchaser of the ticket, and however willing the latter may be to pay the price at which the ticket is resold, nevertheless, if the broker receives more than fifty cents above the printed price, he is guilty of a misdemeanor, his license becomes at once revocable and he becomes liable upon his bond. In this aspect the statute under review not only differs from the "ancient statutes," but is totally different from the ordinance considered in *People ex rel. Cort Theatre Co.* v. *Thompson, supra.*

A statute limiting the price of books or fixing the prices at which they may be resold affords an apt parallel. The cost of books affects more people than that of theatre tickets. It is well known that in the past ten years books which formerly sold for $2 now bring $5. This increase in price affects the most essential school books. Would the charge of extortion and fraud or even of theft warrant a legislative limitation of the prices of publishers

or retailers? There might be an outcry with respect to the price of any commodity or any form of labor as compared with pre-war prices. The face prices of orchestra seats in New York theatres at present vary from $2.75 to $5.50 apiece (*Rec.*, p. 20). Before the war the maximum price, save in exceptional cases, was $2.50. Railroad fares have also greatly increased. Masons, bricklayers, carpenters and house painters receive from $10 to $15 a day. There are those who claim that these are extortionate charges. But let us suppose the impossible—that the legislatures were so to declare and to reduce them by one-half!

A mere outcry against fraud, extortion and exorbitant rates does not justify this legislation. Under this act, given a sale "at a price in excess of fifty cents in advance of the price printed on the face of the ticket," a misdemeanor has been committed, however free from fraud or extortion or exorbitancy the transaction may have been.

(4) The opinion of Judge Lehman further comments on the testimony that those engaged in the business of reselling tickets *are compelled by theatre managers,* even before the first performance of a new play, to buy and pay for seats eight weeks in advance (pp. 326, 327).

The statute does not forbid the purchase by ticket brokers from the theatre managers of tickets in advance of the staging of a play. Nor does it prohibit theatre managers from resorting to this method of financing their operations. The usefulness of a broker to the public depends on his ability to serve and to secure seats for those who otherwise would be unable to procure them, e. g., accommodations suited to a playgoer who is deaf or of impaired sight which he might not be able to secure, or which if a stranger he could not obtain. It is therefore both necessary and desirable for the broker to acquire in advance tickets to satisfy these various demands.

The business of a broker being recognized as lawful, there is nothing in the statute which renders such an acquisition of tickets a violation of law. *The so-called "compulsion" imposed upon the broker or, more accurately speaking, the criticized business method instituted by theatre managers is not sought to be punished.* In that respect this case differs fundamentally from *People ex rel. Cort Theatre Co.* v. *Thompson.* Here, there is no element of conspiracy between the brokers and the theatre owners, such as there was in the case cited. Nor are the pains and penalties of this Act directed against the theatre managers who have created this practice. The only obligation which the statute imposes on them is that of printing on the face of each ticket the price charged for admission to the theatre, and the only violation for which the theatre manager may be punished is his failure to print "the price charged for the ticket" by him. The statute does not even prohibit the theatre manager from actually receiving for the ticket sold by him a price in excess of fifty cents above that printed on the face of the ticket. In fact, Judge Lehman, referring to this statute, on page 330, says:

> "It does not prohibit the producing manager from charging the public all that the public will pay, but leaves the regulation of price between producer and consumer to the free play of the laws of supply and demand. It does not even prohibit brokers from obtaining control of the supply of choice seats in advance of public sale. It merely prohibits brokers from charging more than a fixed and presumably reasonable profit whether they acquire such control or not and thereby it reasonably tends to end the extortion which, the Legislature could properly find, exists and constitutes an abuse which is so general and of such importance as to call for legislative remedy."

The last sentence quoted, it is submitted, is a *non sequitur* to the two previous sentences. In spite of what has been said in other parts of the opinion, it indicates that the statute is a price-fixing statute so far as it relates to the service rendered by the broker. It is not based on the theory that the brokers have acted unlawfully or fraudulently. *Mutatis mutandis,* the same reasoning might be indulged if, instead of relating to theatre tickets, the broker whose charges were to be regulated had been concerned in selling a food product, textiles, livestock, land, pictures, or any other property. The interpolation of the word "extortion" by way of characterization, cannot make that illegal which otherwise would be entirely lawful.

(5) Equally erroneous is the statement (pp. 330, 331):

> "But, even if we were to assume that the interest of the public in such business is not in itself sufficient to justify regulation of price, yet a statute which reasonably limits the amount which brokers may charge upon the resale of a ticket in order to end the abuse of extortion of large additional amounts by reason of the control of the supply should not be condemned merely because the Legislature has seen fit to use price regulation as the instrument which may accomplish the desired purpose."

This is merely playing with words.

The same process of reasoning, or, rather, the same phraseology, would permit the Legislature to resort to price regulation for the purpose of dealing with any imaginable abuse that might arise in any conceivable business. If the business itself cannot be forbidden merely because of the existence of some abuse, it would seem to follow that if price fixing, as such, is unconstitutional, it cannot be justified merely because it might drive those engaged in the business out of it.

Adams v. *Tanner*, 244 U. S. 594, 595.
People ex rel. Tyroler v. *Warden of City Prison*, 157 N. Y. 123, 124.
A. M. Holter Hardware Co. v. *Boyle*, 263 Fed. 134.

The frequent repetition of the idea that the brokers have a control of the supply of tickets, is not in conformity with the facts. In his affidavit (*Rec.*, p. 24) Mr. Marks testifies:

> "In Manhattan and Brooklyn there are at least 108 first class theatres. In the Borough of Manhattan there are at least 283 moving picture theatres, in the Borough of Brooklyn at least 315, in the Borough of Queens 71 and in Richmond 9. There are many other places of amusement in those localities.
>
> The ticket brokers have not control of the supply of tickets to these various places of amusement. The various ticket brokers are in sharp competition with one another. There is also in the City of New York a cut-rate agency which sells many thousands of tickets at prices less than those charged at the theatres and which it is understood are placed on sale at such agency by the theatres."

To say, therefore, that the brokers have a control of the supply of tickets, is an unwarranted assumption. The circumstance that, in order to supply themselves with the commodity which the public seeks to secure through them, they are obliged to lay in a stock of tickets for various theatres, by no means constitutes a control of the supply, even though the aggregate number of tickets that may at certain times be in the possession of all of the brokers combined may be substantial. The various brokers are active competitors for business. Unless they can sell their tickets they would be ruined financially, because of the

very considerable expense involved in carrying on their respective businesses. The public has the benefit of this competition.

The same argument could be made with regard to dealers in furs, silk fabrics, or any other article of trade in which the supply may be limited and is at times held by a restricted number of brokers or dealers. The fact that they regulate their prices in accordance with the demands of the taste or fashion of the hour, or the public preference, and secure a larger profit because of being able to meet the sometimes inexplicable fancy of the public, would certainly not sustain a price-fixing statute. If it did, it would be destructive of trade and commerce and an encroachment upon liberty.

(6) On page 329, Judge Lehman says:

> "The Legislature has the power to regulate reasonably acts which lead to abuses, through which the general public is compelled to pay a group of men for services which at least in part are not desired by the public, especially where such acts occur in a business which is measurably affected with a public interest."

Here, again, it is important to distinguish between legislation which defines abuses and then seeks to deal with them, and legislation which imposes a burden upon a legitimate business which is likely to destroy it or drive those who are engaged in it out of the business, by the process of price-fixing. It is not within the legislative power to fix the price at which a theatre manager may sell his tickets, or to secure cheap tickets for theatregoers, or to determine how much the public may voluntarily pay the ticket broker who serves it and who does so because of the public demand for his services. The fact that a part of the public does not desire the services of the broker

is not a justification for legislation leading to the abolition of ticket brokerage. The wishes of those who do not desire to avail themselves of that convenience should not prevail over those of others who habitually do. Undoubtedly, if left to the consumer, the prices of all commodities, except those which he purveys, would be fixed at sums below the cost of production. Surely, a matter of this kind cannot be determined by a plebiscite. Whatever may be the views of A, they should not determine for B whether or not he may secure the services of ticket brokers to supply him with theatre tickets on payment for that service of such sum as he may agree upon as suitable compensation. If the public did not desire such services, inexorable economic laws would speedily eliminate the broker. It is because he is found to be useful that he plays a part of the acquisition of theatre tickets by the theatregoing public.

(7) In the course of the opinion of the Appellate Division in *People* v. *Weller*, Mr. Justice Martin said (207 App. Div. 342):

> "The evils of theatre ticket speculating are undisputed. The street speculator in particular has become a nuisance. His purpose is to prey on the people by selling his tickets at an extortionate price."

If this is intended as a statement that it is not disputed that the business of a ticket broker is an evil, it is certainly an erroneous assumption. We contend that the broker subserves a very useful purpose, beneficial, and not injurious, to the public. The opinion of the Court of Appeals in *People* v. *Weller* (p. 321) so concedes.

The reference to the street speculator is entirely gratuitous. It is not pretended that appellants are street

speculators, or that the Act under consideration was aimed at street speculators. They are an entirely different class of persons from those to whom this statute applies. By a previous Act (New York Laws of 1921, Chap. 12), specific provision was made, with the concurrence of the brokers against whom this Act is aimed, which prohibited the activities of ticket speculators in the streets of a city. It added Section 1534 to the Penal Law, as a part of Article 148, relative to nuisances. It was unquestionably within the power of the Legislature to regulate the use of city streets, especially in so far as it might be attempted to conduct in any such street, in or about the premises of any theatre or concert hall or place of public amusement, the business of selling or offering for sale tickets of admission to a performance therein. Apparently the learned Justice confounded the street speculator with the legitimate dealer who sells theatre tickets in an orderly manner at a place of business maintained for that purpose.

(8) Mr. Justice Martin says (207 App. Div. 342):

> "Historically considered, theatres may be regarded as 'affected with a public interest.' A. E. Haight, in his book 'The Attic Theatre,' at page 4, said: 'To provide for the amusement and instruction of the people was, according to the Greeks, one of the regular duties of a government; and they would have thought it unwise to abandon to private ventures an institution which possessed the educational value and wide popularity of the drama."

It may be safely said that no such idea prevails in this country. Certainly a theatre is not regarded as affected with a public interest in the sense that land may be condemned under the power of eminent domain for the building of a theatre. That would not be regarded as taking

property for a public use. In fact, it has been held that the taxing power may not be exercised for the establishment and operation of moving picture theatres (*State ex rel. Toledo* v. *Lynch*, 88 Ohio St. 71; 48 L. R. A., N. S., 720). Nor, judging from some of the plays which at times degrade the stage and are offensive to a considerable part of the public, may it be said that public education is the function of the theatre. At all events, the primary purpose of the theatre is to amuse and entertain.

Referring to the passage quoted, it may not be out of place to say that after the Greeks came the Puritans, whose influence upon our constitutional form of government is more immediate and lasting than that of ancient Athens, and that the Pilgrim Fathers, as well as some of the prominent framers of our Constitution, would have been astounded had it been intimated to them that the theatre was "affected with a public interest," as that phrase is used in the Act now under consideration.

(9) With considerable heat, and, we submit, with some inconsistency, Mr. Justice Martin says (207 App. Div. 353):

> "The statute now under consideration not only permits the resale of tickets, but allows any suitable person who desires to do so to pursue the occupation of reselling tickets. It does not limit or fix the price which the theatre may charge for tickets. It does not interfere with the sale at any price that the theatre sees fit to charge, but it provides that anyone who wishes to carry on the business of reselling tickets must do so after he obtains a license, and that, when he does obtain the license, he must sell the ticket at a profit which is fair and reasonable. It strikes at the extortioner only. It prevents fraud and the exaction of an extortionate price from the people who desire to purchase theatre tickets. The act regulates the charges of the speculator or broker. It prohibits those who have

> a monopoly of the tickets, made possible by the arrangements with the theatres, from charging extortionate fees for 'service' in securing and selling tickets."

The concession that the theatre owner is not prevented from selling the ticket at any price he may fix, without limitation of any kind, is in the same breath coupled with the incongruous idea that the ticket broker is enabled, by arrangement with the theatres, to have an imaginary monopoly of the theatre tickets. The shafts of judicial denunciation are thus aimed at the broker, who is described as an extortioner and whose compensation for service rendered is referred to ironically.

This is nothing but a begging of the question. If the ticket broker is an extortioner or is guilty of fraud, which we deny, then the statute should define and punish acts of fraud and extortion. This the Act under consideration studiously fails to do. The Legislature contents itself with arbitrarily fixing the compensation to which a broker is entitled for actual service, however honestly and honorably rendered, however free from fraud, extortion and exaction, and however welcome and convenient to those who visit the theatre and have not the time to stand in line at its doors and to take their chances of securing the accommodations which they desire and for a time to suit their convenience.

The calling of names does not, any more than does the use of profane language, tend to the elucidation of a question relating to constitutional rights.

(10) At 207 App. Div. 349 (see p. 64), Mr. Justice Martin, referring to the fact that the ticket brokers were often required by the theatre owners to purchase tickets for weeks ahead, said:

> "This combination of theatre owner or manager with speculator or broker by which the attraction

is financed or underwritten by the ticket broker or speculator, tends to a monopoly which prevents the public from seeing the performance on any reasonable terms."

The inference from the fact that the broker makes a quantity purchase of tickets from the theatre owner, that there is a combination between them which tends to a monopoly, is far-fetched and unfounded. The broker buys the tickets in advance because he needs them to supply his customers, and the theatre owner takes advantage of the opportunity to require the broker to make quantity purchases of tickets and is thus enabled to find a market for his commodity which otherwise he might not be able readily to sell. Far from being a combination, the theatre owner and the broker are dealing at arm's length. This does not create a monopoly or prevent the public from seeing the performances at the various theatres.

The situation is precisely the same as that which exists when a middleman makes a quantity purchase from a manufacturer or producer, in order to enable him to supply the needs of his customers. In such instances the middleman frequently pays the manufacturer or producer in advance for the merchandise subsequently manufactured and delivered, and facilitates the latter in the financing of his business. That does not constitute a combination or monopoly, even though the fabric or product may be of unique character, and is especially desirable because it bears a popular trade-mark.

Even if there were no brokers, the owner of a theatre producing a popular play might sell out his house, as it is called, for weeks ahead, and, as is conceded, might charge for his tickets of admission any price he chooses. From the very nature of things, the number of tickets, and especially of front seats, for any theatrical performance is limited by the capacity of the theatre and the length of

the run, which depends on unknown factors. It might, therefore, be argued with equal justice that if the theatre owner increased the price of his tickets, he would be engaged in carrying on a monopoly "which prevents the public from seeing the performance." If that is a monopoly, a revision of that term would become necessary.

Were Walter Hampden to play "Cyrano" in New York for six months and enjoy the vogue among theatregoers which his art deserves, the physical limitations of the theatre in which he appeared would make it impossible to accommodate many of those desiring to hear him. To a great extent the successful ones would owe their opportunity to the ticket brokers. Eliminating the latter, the theatre owner would be the sole source of supply. The reduction of the price of tickets to a nominal sum could not increase the number of auditors. It is idle, therefore, to speak of a "monopoly" in so far as the ticket brokers are concerned.

(11) Throughout these opinions there is a striking omission of any reference to the converse proposition that, if the Legislature may fix prices at a low rate, it may likewise increase them to a high level. Thus, if theatrical managers were able to show to the Legislature that they cannot flourish by charging $5 for an admission ticket, and a theatre were to be regarded, as has been held below, as being clothed with a public interest, why would not, then, the Legislature have the power to declare that the price of tickets shall be increased to $6 or $8 in order to assure the owner a substantial profit? Or, if the business of a ticket broker is likewise to be regarded as affected by a public interest, and he were to contend that a charge of 50 cents in advance of the price printed on the ticket is inadequate to enable him to make ends meet, then why might not the Legislature enact that his customers shall

pay him for his services $1 or $2 per ticket in order to assure to him prosperity?

By the same token, masons, bricklayers, carpenters, painters and ironworkers might have their daily wage fixed at $25. This is not fanciful. Determined efforts have been made only recently to fix by legislation the prices of wheat and corn and cotton at guaranteed sums far beyond the present market value. Such an enactment would mean that the Legislature would obligate the consumer to pay the prices artificially fixed by its fiat. It is considerations such as these which indicate the importance of the constitutional question now presented for adjudication.

IV.

It is respectfully submitted that the decree appealed from should be reversed and the case remanded to the District Court for the Southern District of New York with instructions to grant an interlocutory injunction against the District Attorney of the County of New York and the Comptroller of the State of New York in accordance with the prayer of the complaint.

LOUIS MARSHALL,
JAMES MARSHALL,
Appellant's Counsel.

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 261.

TYSON AND BROTHER-UNITED THEATRE TICKET OFFICES, INC.,

Appellant,

against

JOAB H. BANTON, as District Attorney of the County of New York, State of New York, and VINCENT B. MURPHY, as Comptroller of the State of New York.

APPELLANT'S MEMORANDUM ON JURISDICTION, FILED BY PERMISSION OF THE COURT.

LOUIS MARSHALL,
JAMES MARSHALL,
Appellant's Counsel.

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JOAB H. BANTON, as District Attorney of the County of New York, State of New York, and VINCENT B. MURPHY, as Comptroller of the State of New York.

APPELLANT'S MEMORANDUM ON JURISDICTION, FILED BY PERMISSION OF THE COURT.

I.

This case was properly brought in the United States District Court to protect the appellant's property rights against infraction by a statute claimed to be unconstitutional.

The bill of complaint graphically describes the nature of the business conducted by the plaintiff, that of selling tickets of admission to theatres and places of amusement. It indicates the volume of the business transacted, the

manner in which it is conducted, the expenses incurred, the effect of the statute which has been challenged upon the business, the fact that the plaintiff has obtained a license upon the execution of a bond, in the penal sum of $1,000, with sureties, that such bond would be forfeited if the plaintiff sold tickets at a price exceeding fifty cents beyond that printed on the ticket, and that the license would be subject to revocation and the plaintiff would be punishable for a misdemeanor for every violation of the provisions of the statute. For each misdemeanor the plaintiff could be punished by one year's imprisonment or a fine of $250 or both.

This brings the case within a long line of decisions, of which the following is an incomplete list:

Ex parte Young, 209 U. S. 123.
Truax v. *Raich*, 239 U. S. 33.
Adams v. *Tanner*, 244 U. S. 590.
Assaria State Bank v. *Dolley*, 219 U. S. 121.
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Pierce v. *Society of Sisters*, 268 U. S. 510.
Weaver v. *Palmer Bros. Co.*, decided March 8, 1926, 46 Supreme Court Rep. 320.

In each of these cases an action was brought in equity in the United States District Court for an injunction restraining public officials from enforcing a penal statute under circumstances similar to those set forth in the bill of complaint in the present case, and the existence of jurisdiction in equity was recognized.

The rule applicable to jurisdiction in equity to relieve against such a state of facts is stated by Mr. Justice Sutherland in *Packard* v. *Banton, supra,* as follows:

> "But it is settled that 'a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property.' *Truax* v. *Raich,* 239 U. S. 33, 37-38. The question has so recently been considered that we need do no more than cite *Terrace* v. *Thompson,* 263 U. S. 197, where the cases are collected; and state our conclusion that the present suit falls within the exception and not the general rule."

In *Pierce* v. *Society of Sisters, supra,* Mr. Justice McReynolds said, referring to the complainants:

> "But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss sustained by such action."

The fact that such jurisdiction exists is necessarily implied by the enactment of Section 266 of the Judicial Code, which lays down the procedure in an action in which an injunction is sought to suspend or restrain the enforcement, operation or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute upon the ground of its unconstitutionality. The requirements of that Act were strictly complied with in the present case.

Similar procedure was adopted in *Burns Baking Co.* v. *Bryan,* 264 U. S. 504, although that case came here on

error to the Supreme Court of the State of Nebraska and was reversed.

It is also to be noted that the constitutionality of Chapter 590 of the New York Laws of 1922, now under consideration, was sought to be reviewed in this Court in *Weller* v. *New York*, 268 U. S. 319, after a decision by the Appellate Division of the New York Supreme Court (207 App. Div. 337) and by the New York Court of Appeals (237 N. Y. 316). This Court, therefore, has the benefit of the views of those tribunals respecting the constitutionality of this Act. Those opinions are analyzed under Point III of our Brief, at pages 62-80. The *Opinion of the Justices*, 247 Mass. 589, based on the decision of the New York Court of Appeals in *People* v. *Weller*, is also analyzed on pages 36-45 of our Brief. These two opinions present all of the arguments advanced on behalf of the appellees herein.

The procedure adopted in reliance upon the numerous recent precedents of this Court is in the interest of a speedy administration of justice. The sole question to be determined is whether the legislation which has been challenged violates the due process clause of the Constitution.

Respectfully submitted,

LOUIS MARSHALL,
JAMES MARSHALL,
Appellant's Counsel.

To be argued by
FELIX C. BENVENGA.

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 261

TYSON AND BROTHER-UNITED THEATRE TICKET OFFICES, INC.,

Appellant,

against

JOAB H. BANTON, as District Attorney of the County of New York, State of New York, and VINCENT B. MURPHY, as Comptroller of the State of New York,

Appellees.

BRIEF FOR APPELLEE JOAB H. BANTON, as District Attorney, etc.

FELIX C. BENVENGA,
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To be argued by
FELIX C. BENVENGA.

Supreme Court of the United States,

OCTOBER TERM, 1926.

TYSON AND BROTHER—UNITED THEATRE TICKET OFFICES, INC., Appellant, *against* JOAB H. BANTON, as District Attorney of the County of New York, State of New York, and VINCENT B. MURPHY, as Comptroller of the State of New York, Appellees.	No. 261.

BRIEF FOR APPELLEE JOAB H. BANTON, as District Attorney, etc.

Statement.

This is an appeal from a decree or order of the District Court of the United States for the Southern District of New York, entered December 12, 1925, denying an application for a temporary injunction to restrain the above-named appellees from bringing or permitting to be brought any

proceeding at law or in equity for the purpose of enforcing Chapter 590 of the Laws of 1922 of the State of New York (General Business Law [Cons. Laws, Chap. 20], §§167-174), upon the ground that the said statute and each and every part thereof is unconstitutional and void.

The Statute Involved.

By Chapter 590 of the Laws of 1922, the General Business Law of the State of New York [Consol. Laws, Chap. 20] was amended by inserting therein a new article, as follows:†

"ARTICLE X-B.

THEATRE TICKETS.

§167. MATTERS OF PUBLIC INTEREST. It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.

§168. RESELLING OF TICKETS OF ADMISSION; LICENSES. No person, firm or corporation shall resell or engage in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held without

† The statute is copied in the margin of this Court's opinion in *Weller* v. *New York* (268 U. S., pp. 322-324).

having first procured a license therefor from the comptroller. Such license shall be granted upon the payment by or on behalf of the applicant of a fee of one hundred dollars and shall be renewed upon the payment of a like fee annually. Such license shall not be transferred or assigned, except by permission of the comptroller. Such license shall run to the first day of January next ensuing the date thereof, unless sooner revoked by the comptroller. Such license shall be granted upon a written application setting forth such information as the comptroller may require in order to enable him to carry into effect the provisions of this article and shall be accompanied by proof satisfactory to the comptroller of the moral character of the applicant.

§169. Bond. The comptroller shall require the applicant for a license to file with the application therefor a bond in due form to the people of the State of New York in the penal sum of one thousand dollars, with two or more sufficient sureties, who shall be freeholders within the State of New York, conditioned that the obligor will not be guilty of any fraud or extortion, and will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by this article. The comptroller shall keep books wherein shall be entered in alphabetical order all licenses granted and all bonds received by him as provided for in this article, the date of the issuance of such licenses and the filing of such bonds, which record shall be open to public inspection. A suit to recover on the bond required to be filed by the provisions of this article may be brought by the comptroller or on the relation of any party aggrieved in a court of competent jurisdiction, and in the event that the obligor named in such bond has violated any of the conditions of such bond, recovery for the full penal sum of such bond may be had in favor of the people of the State.

§170. Revocation of Licenses. In the event that any licensee shall be guilty of any fraud or misrepresentation

or shall charge for any ticket a price in excess of the price authorized by this article or otherwise violate any of the provisions of this article or any other law or local ordinance, the comptroller shall be empowered, on giving ten days' notice by mail to such licensee, and on affording such licensee an opportunity to answer the charges made against him, to revoke the license issued to him.

§171. Supervision of Comptroller. The comptroller shall have the power, upon complaint of any citizen or of his own initiative, to investigate the business, business practices and business methods of any such licensee if in the opinion of the comptroller such investigation is warranted. Each such licensee shall be obliged, on request of the comptroller, to supply such information as may be required concerning his business, business practices or business methods.

§172. Restriction as to Price. No licensee shall resell any such ticket or other evidence of the right of entry to any theatre, place of amusements or entertainment, or other place where public exhibitions, games, contests or performances are given at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry. Every person, firm or corporation who owns, operates or controls a theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are held shall, if a price be charged for admission thereto, print on the face of each such ticket or other evidence of the right of entry the price charged therefor by such person, firm or corporation.

§173. Violations; Penalties. Every person, firm or corporation who resells any such ticket or other evidence of right of entry or engages in the business of reselling any such ticket or other evidence of the right of entry, without first having procured the license prescribed and filing of a bond required by this article shall be guilty of

a misdemeanor. Every person, firm or corporation who violates any provisions of this article shall be guilty of a misdemeanor.

§174. CONSTITUTIONALITY OF ARTICLE. In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of the remaining provisions of the article."

This act became a law April 12, 1922.

Introductory.

The question of the constitutionality of this statute has already been before the courts for decision. The Court of Appeals of the State of New York has upheld it in its entirety (see *People* v. *Weller*, 237 N. Y. 316; affg. 207 App. Div. 337), and this Court has upheld it in part (see *Weller* v. *New York*, 268 U. S. 319). A lower New York court—the Court of General Sessions of the County of New York—had previously nullified a city ordinance substantially similar to the statute herein involved (see *People* v. *Newman*, 109 N. Y. Misc. 622). And although the judgment of the lower court was affirmed upon appeal, the affirmance was upon the ground that error was committed in the exclusion of evidence; the Appellate Division specifically holding, so far as the constitutional point was concerned, that, "For the reasons stated in *People* v. *Weller* (207 App. Div. 337), decided herewith, we reject the reasoning advanced in the Court of General Sessions so far as it is intended to show that there was no power to adopt the ordinance in question" (see *People* v. *Newman*, 207 App. Div. 354).

The statute contains two salient provisions:

(1) It prohibits persons from reselling or engaging in the business of reselling tickets of admission to theatres and other places of amusement, unless they first obtain a license from the State Comptroller (Gen. Bus. Law, §168).

(2) It places a restriction upon the amount which said licensees may charge the public for such tickets—they may not charge more than 50 cents in excess of the price printed on the face of the tickets (*Id.*, §172).

In the *Weller* case (*supra*), it was contended by counsel for Weller that these provisions were inseparable; that the provision which undertook to restrict the resale price (§172) was clearly invalid, and that, consequently, the whole statute would have to fall. As counsel for the People, we maintained that the power of the State to require licenses from persons engaged in the aforesaid business was clear, and that, strictly speaking, the question of the validity of the price-restriction provision of the statute was not involved.

This Court upheld the contentions of the People. It decided: (1) That the State had power to require licenses of those engaged in the aforesaid business; and (2) that, in the absence of an authoritative announcement of another view by the courts of the State, it would hold the license provision separable from the price-restriction provision.

It will be observed, therefore, that although the statute has been upheld in its entirety by the Court of Appeals, the validity of the price-restriction provision is the only question now open for decision by this Court.

We may add that, following the decision of the Court of Appeals in the *Weller* case (*supra*), the Justices of the Supreme Judicial Court of Massachusetts, in an opinion rendered to the General Court of the Commonwealth, ad-

vised that if the legislative authority of the State should find that prices and other conditions attending the sale of tickets of admission to theatres and other public places of amusement requiring a license, are matters affected by a public interest, and that legislation is necessary for the protection of the public against fraud, extortion and similar abuses in connection therewith, a statute which would provide for a price limit, reasonably calculated to prevent extortion, but affording a reasonable profit to persons engaged in the resale of tickets to public places of amusement, might constitutionally, be enacted (*Opinion of Justices,* 247 Mass. 589; 143 N. E. 808).

The Facts.

1. The bill of complaint asserts that the plaintiff (the appellant herein) has duly complied with the provisions of the statute herein involved, by filing the bond prescribed therein, and by obtaining from the Comptroller of the State of New York the necessary license to engage in the business of the re-sale of theatre tickets. The complaint then prays that a temporary injunction be granted enjoining the defendants (the appellees herein) from bringing or permitting to be brought any proceeding at law or in equity for the purpose of enforcing the provisions of the said statute, upon the ground that it is

> "unconstitutional and void and each and every section thereof is unconstitutional and void under the Fourteenth Amendment of the Constitution of the United States in that it deprives the plaintiff [appellant] of its liberty and property without due process of law and of the equal protection of the law" (R. 7).

2. In support of the application, the plaintiff submitted the affidavit of David Marks, its president (R. 17-22). (This affidavit embodies allegations substantially similar to those contained in the bill of complaint [cf. R. 1-8; 17-23].)

(*a*) Attention is called to the fact that there is no allegation in Marks' affidavit that the charge permitted by the statute is not a fair, adequate and reasonable compensation for the service rendered by the plaintiff or other licensees. (Nor, we may add, is there any allegation in the bill of complaint to that effect.)

Marks' affidavit, however, contains this statement: That "by reason of the heavy costs of its overhead *and* cost of delivering tickets *and* the cost of obtaining tickets *at a premium* for resale to its customers, plaintiff is frequently unable to sell tickets except at a loss" (R. 21).

But this statement, apparently, has reference to the plaintiff's "frequent" practice (also mentioned in Marks' affidavit) of buying tickets in the open market from speculators and paying them a price (as set forth in Marks' affidavit) "in excess of the price printed upon the face of the ticket" (R. 19).

It goes without saying that, if the plaintiff buys tickets from speculators at a price 50 cents *in excess* of the price printed upon the face thereof, it cannot legally resell such tickets except at a loss.

Furthermore, it would seem to us—assuming, of course, the constitutionality of the statute—that a person who buys a ticket at a price in excess of that authorized, for the purpose of afterwards reselling the same ticket at a price in excess of that authorized, is aiding and abetting the violation of the statute, and is, together with the person

from whom he bought the ticket, guilty of crime (N. Y. Penal Law [Laws 1909, Chap. 88], § 2).

In answer to Marks' affidavit, we submitted the affidavits of John McBride, the Treasurer of the McBride Theatre Ticket Offices, Inc., and John L. McNamee, the President of Tyson & Co. These companies are two of the largest theatre ticket agencies in the City of New York.

The affidavits of McBride and McNamee show that the advance of 50 cents permitted by the statute is a fair, adequate and reasonable compensation for the service rendered by ticket brokers (R. 54-55, 56).

The affidavits of McBride and McNamee also show that their respective companies have, since the enactment of the statute, discontinued the practice of buying tickets for customers in the open market; that their business has not suffered in consequence of it; but, on the contrary, it is thriving and increasing annually (R. 54, 56).

(*b*) In his affidavit, Marks states that approximately one-half of the tickets dealt in by his company are subscribed for by it before the opening of the performance, and "frequently" before the performance has even been cast; that such subscriptions must be made eight weeks in advance, and must be paid for two weeks in advance; that, if plaintiff fails to sell these tickets, it is allowed no more than 25% of them, and that "sometimes the theatres charge a premium on the tickets so purchased" (R. 19-20). —In other words, the impression sought to be created is that the theatre ticket brokers "finance" the theatrical performances and are compelled to buy tickets. At least, this was Marks' testimony in the *Weller* Case (R. 37).

The affidavits of McBride and McNamee state that no pressure is exerted upon their companies to purchase any

tickets for any performance, and that they are permitted to use their own discretion and subscribe for and purchase what number of tickets they please and whenever they please (R. 54, 56). So, that if the statements contained in Marks' affidavit are correct, his company is being discriminated against, and, if, in addition, his company is being mulcted out of a "premium", the crime of extortion (N. Y. Penal Law, §850; *People ex rel. Short* v. *Warden*, 145 App. Div. 861, affd. 206 N. Y. 632), or that of violating the "anti-tipping" statute (N. Y. Penal Law, §439), is being committed, or both.†

(*c*) Marks' affidavit also alleges that, during the three years last past, plaintiff's loss for unsold tickets averaged $70,210, or a total of 18,230 tickets (R. 20). There is, of course, no way by which we can verify these figures. We are informed, however, that these figures show a loss out of all proportion to that sustained by the large agencies (R. 31-32).

Assuming, however, that they are correct, they merely go to show that the plaintiff conducts its business either improvidently or (perhaps) illegitimately—that it retains more tickets than it can dispose of, perhaps for the purpose of speculation, after the time within which they may be returned to the theatres; or that it is obliged to retain a large number of such tickets, in order to live up to its contracts to supply customers with choice seats at very short notice (probably a violation of the statute), for which

† The District Attorney believes, as Marks states, that the theatres sometimes do charge "a premium" on tickets purchased by ticket brokers or speculators—especially where there is a large demand for these tickets, and the ticket brokers and speculators are charging exorbitant prices in excess of the fifty cents permitted by the statute. This is the abuse that the ordinance declared valid in *People ex rel. Court Theatre Co.* v. *Thompson* (283 Ill. 87, 119 N. E. 41) was designed to remedy (*vid.* pp. 23-24, *infra*).

it receives large extra compensation. (The existence of these contracts is referred to in the affidavit of the District Attorney, submitted below [R. 28 *et seq.*].)

(*d*) In this connection, we desire to point out that the allegations in Marks' affidavit, with reference to the volume of the plaintiff's business and its receipts, expenses and losses, are, to say the least, grossly misleading. Marks states that the plaintiff sells 300,000 tickets a year. This would legitimately net the plaintiff a gross income of $150,000. As against this, Marks sets forth expenses and losses as follows: Rent, salaries, &c., $58,630; unsold tickets (already referred to), $70,210; miscellaneous losses, $5,000; making a total in all of $133,840 (R. 18-19). So that, by implication, at least, Marks would have the Court believe that the plaintiff's net yearly profits average $16,160, and that the effect, therefore, of the price-restriction feature of the statute is to deprive the plaintiff of a fair and reasonable profit on its investment. But, as we have already pointed out, there is no specific allegation in Marks' affidavit or in the bill of complaint to that effect (*vid.* p. 8, *supra*).

And, as we have also pointed out, the plaintiff's sources of revenue (according to the District Attorney's information, which information is embodied in the affidavit submitted below) are not confined to the fifty cents on each ticket resold authorized by the statute. The plaintiff has, as already set forth, an income (probably, illegitimate) derived from contracts, by which it, in effect, guarantees to supply customers with choice seats at very short notice (R. 30-31).

So, also, according to the District Attorney's information, the plaintiff has another source of revenue (perhaps,

legitimate). It exacts what is known as a "service" charge to customers who carry a charge account. This charge is for the extra service of carrying the account, keeping books, &c., &c. (R. 31). According to Marks' affidavit, one-half of the plaintiff's business is conducted on this basis (R. 18). The existence of this "special service department" is admitted in Marks' reply affidavit (R. 24). And, of course, there may be other sources of revenue (legitimate or illegitimate), concerning which we have no direct knowledge or information.

We may, in this connection, confess the quite obvious fact that it has been a difficult matter for the District Attorney to obtain any information concerning either the theatrical business or the ticket brokerage business. He has reason to believe that there are other evils and abuses connected with these businesses which may have been known to the Legislature, but of which he has no direct knowledge or information.

3. In opposition to the motion, we also submitted Marks' testimony in behalf of the defendant upon Weller's trial in the Court of Special Sessions in the City of New York (R. 34, *et seq.*). His testimony on direct-examination shows the manner in which the ticket brokerage business is conducted and the intimate relationship between persons engaged in that business and those conducting the theatres. He testified:

> "Q. Whom do you get these tickets from? A. Theatre managers.
>
> "Q. How do you get them from the theatrical managers? A. *We buy them in blocks, each office is allowed so many seats.*

"Q. The theatrical managers put on a production, whatever the play may be? A. Yes, sir.

"Q. Then they say to the ticket brokers, that they will allow them to have a certain number of tickets for that production? A. Yes, sir.

"Q. When is that part of the arrangement made? A. Before the show is cast and before we know anything about who is in the show, we are sent for and told how many tickets we are to get and each office has to pay, is compelled to buy.

"Q. Who sends for you? A. The managers of the various productions" (R. 34-35).

"Q. You are telling us just how the brokers get their tickets from the various theatre owners. You say, that when an attraction is about to be put on the boards, before there has been a production of the play at all, you are sent for, the various brokers, by the theatre owners and a conversation takes place? A. Yes, sir.

"Q. What is the nature of the conversation? A. We are going to produce—the manager of the theatre representing the owner of the theatre, we are going to produce a show four weeks from next Monday night and it is going to open at a certain theatre, and they say, how many seats do you want for that show for eight weeks in advance? We have asked for time to see how many we can use for that production at that particular theatre, and we are not given time in many cases and we must purchase the number of tickets, and we have got to buy them for eight weeks in advance, and we don't know the name of the show or the cast, and we are compelled to buy them at four and five dollars a piece plus the war tax and compelled to pay for them and pay for them at that rate for eight weeks in advance, running into an investment of fifty or sixty thousand dollars.

"Q. *In other words, you finance the theatrical performance?* A. *Yes, sir.*

"Q. And you have to pay in advance? A. Yes, sir, and it takes hundreds of thousands of dollars.

* * *

"Q. And because you are bound to pay this amount, it is a dead loss if you cannot sell the tickets? A. Yes, sir; a loss of thousands of dollars on a production" (R. 37-38).

(*a*) Marks' direct testimony also shows a monopoly—the control by a few persons engaged in the ticket brokerage business of approximately one-half of the choicest tickets.

"Q. If these people did not get these tickets from you in this way, how would they get them, they would have to go to the box office? A. No, sir. *The best they could get for any show is the fifteenth or sixteenth row.*

"Q. The best seats have been sold? A. The choice seats.

"Q. If anyone desires to go to the theatre for them at night, they would be far back in the house? A. Yes, sir" (R. 41).

On cross-examination:

"Q. How many ticket speculators are there? A. Ticket brokers?

"Q. Yes, how many? A. Tyson & Co.† have 18 branches, would you call it one office, or call each branch an office?

"Q. Call each branch a separate office? A. About 30 offices.

"Q. There are 30 offices where you can buy tickets from ticket brokers? A. Yes, sir.

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† The affidavit of John L. McNamee, the president of Tyson & Co., was submitted by the District Attorney in answer to Marks' affidavit (R. 55-56, and *vid, supra*).

"Q. And they are controlled by how many people? A. Probably a dozen or fifteen. * * *

"Q. Have you heard how many tickets are sold by the brokers in a year? A. Approximately 2,000,000 tickets.

"Q. And that would be at least 50 per cent. of the desirable seats in the theatre? A. In the downstairs only" (R. 44-45).

(*b*) Marks' direct testimony also shows that the advance of 50 cents permitted to be charged by the statute is fair, adequate and reasonable.

"Q. Do you have an established rate of profit? A. It is fifty cents, we are not allowed to charge more.

"Q. You have charged more in some cases? A. We charge fifty cents for every ticket we handle.

"Q. What you have said as to the method of doing business is practically the same in all cases? A. Yes, sir.

"Q. Are there cases when you do charge more than fifty cents? A. Yes, sir.

"Q. Explain? A. If a customer insists upon two tickets or four tickets for a certain attraction and we have not got them, and the customer requests or suggests that we go out and purchase them outside, we do that, and in that case we pay the market price and still add fifty cents for our service (R. 39).

On cross-examination:

"Q. How many people interested in your business? A. Myself, Mr. Tyson and Mr. Kiesel.

"Q. How many tickets do you sell per year? A. Over one thousand tickets a day.

"Q. That would be over 300,000 tickets a year? A. Yes, sir.

"Q. Your concern has not gone into bankruptcy? A. No, sir.

"Q. It has made money? A. *Made a comfortable living*" (R. 44).

"Q. You say, you sometimes charge over 50 cents? A. Yes, sir.

"Q. In what percentage of the tickets that you sell would that happen? A. Ten tickets a day, or twenty tickets a day.

"Q. Not any more? A. Yes, sir, and many days none at all.

"Q. The occasion for charging more than 50 cents is because you have to go outside and pay more for the tickets? A. Yes, sir, right" (R. 46).

"Q. About how many out of the 300,000 seats that you sell? A. I don't think it would not exceed 5,000 or 10,000" (R. 47).

Concerning the McBride agency, he testified:

"Q. McBride is one of the largest? A. Yes, sir.

"Q. And he sells approximately how many tickets a year? 500,000 tickets a year? A. I think so.

"Q. And his rate is fifty cents over the amount printed on the ticket? A. Yes, sir.

"Q. He has not gone into bankruptcy? A. Not that I heard of.

"Q. He has been doing business for 45 years? A. Yes, sir" (R. 45).

The Question Involved.

The question for this Court to determine is whether the Legislature, in the exercise of its police power, has the right, under the circumstances disclosed by the record, to restrict the price at which theatre tickets may be resold.

In general, we contend that, because the business of reselling theatre tickets is "affected with a public interest", the Legislature, in the exercise of its police power, had the right (and, indeed, it was its duty under the circumstances disclosed by the record) to fix the price at which theatre tickets might be resold by ticket brokers or speculators; and, as the price so fixed is sufficient to yield a fair, adequate and reasonable profit or return for the services rendered, the statute is not unconstitutional.

POINT I.

Regulation is warranted because abuses exist in the business of reselling theatre tickets.

1. To show the manner in which the business of reselling theatre tickets is conducted; the intimate relationship between persons engaged in operating theatres and those engaged in reselling theatre tickets; the control by "a dozen or fifteen" brokers of approximately two million theatre seats a year, or at least half of the choicest tickets, and the existence of fraud, extortion, exorbitant rates and similar abuses in the business, we submitted to the Court below the testimony of David Marks, the president of the plaintiff-appellant herein, who had testified as a witness in behalf of the defendant in the case of *People* v. *Weller* (R. 34-48), together with certain answering affidavits and exhibits thereto annexed (R. 28-56).

Commenting on Marks' testimony, the Court of Appeals said [*People* v. *Weller, supra,* at pp. 326-327]:

> "Under these circumstances it cannot be doubted that when ticket brokers or speculators are permitted to charge any price which they can obtain from a buyer upon the resale of tickets of admission, abuses are not only reasonably to be feared, but actually exist."

The Court further said [at p. 331]:

> "The existence of extortion due to present unregulated conditions in the business of reselling tickets of admission to places of public amusement is widely recognized; the abuse is due to acts of the ticket brokers alone *or in conjunction with producers*, and these acts are calculated to injure large numbers of the public in connection with a business which is at least to some degree affected with a public interest."

The Appellate Division found that there was "ample evidence" that the calling of the ticket speculator has been associated with certain abuses (*People* v. *Weller*, *supra*, at p. 339); and after quoting at some length from Marks' testimony (at pp. 347-348), observed:

> "The method now pursued in the disposal or resale of tickets was described at the trial. It is interesting in that it shows a community of interest between the theatre managers and the brokers who sell to the public, or an underwriting of the attraction by the speculator for which the public must pay. * * * This testimony gives an idea of the theatre ticket business which is carried on by the brokers, and how intimately connected it is with that of the theatre and theatre owners and managers. It is apparent from this record that the theatres and ticket brokers have an understanding or arrange-

ment for the resale of tickets. *The modern method of selling tickets indicates that there is a working agreement between the managers or owners, and the speculator or ticket brokers.*"

In *Opinion of Justices* (*supra*), the Court said:

"It may be presumed that facts found in actual trials in courts in other states are found to exist in kind in this commonwealth. See, for example, *People* v. *Weller*, 237 N. Y. 316, 326, 329. An attempt to safeguard the public against fraud and extortion in connection with sales of tickets to theatres and places of amusement cannot be pronounced vain. Strangers or sojourners may be thought peculiarly liable to abusive practices in this particular. *Moreover, it may be that there has been found to be collusion between the management and those engaged in resale.*"

Commenting on Marks' testimony, the Court below said [R. 60-61]:

"Under such a state of affairs, it is but natural that tickets for the most desirable seats should pass into the hands of the brokers. The seating capacity of theatres showing popular and successful productions is distinctly limited, and the practice just referred to tends towards a monopolistic control of the ticket business by the brokers. Standing as he does to lose money on an unsuccessful play, the broker's reasonable course of procedure is to take full benefit of his control of the market for desirable tickets, and to exact from the theatre-going public the largest price per ticket that it can be induced to pay. Nor is there the least assurance that the price obtained from two or more patrons for seats of the same quality will be the same. * * * Obviously, the oppor-

> tunity for fraud and extortion is much greater when ticket brokers are permitted to procure a large proportion of the desirable seats for a number of attractions, and are moved not only by the desire to make a fair profit on the tickets they control for particular performances, but are likewise concerned with the purpose of overcoming, at the earliest possible moment, the speculative risk that they have assumed with regard to the success with which the plays may meet over a substantial period of time yet to come."

In the opinion below, it is also said [R. 60-61]:

> "No person, at all familiar with theatrical conditions in this city, can say that the legislature, in enacting the statute under attack, was without facts upon which to base its determination that it was desirable from a governmental standpoint, to safeguard the theatre-going and amusement-seeking, public, against fraud, extortion, exorbitant rates and similar abuses."

2. Furthermore, as the distribution of tickets is very largely in the hands of ticket brokers and speculators, it is easy to see that they have many opportunities for practicing fraud upon and deceiving the public. They might sell tickets to persons for seats already sold to others. They might discriminate against particular persons or classes of persons. They might sell tickets for places of amusement that are closed or for shows that are not running. They might deceive purchasers as to the location of the seats. And their businesses being generally conducted at places distant from theatres, purchasers will very often have difficulty in obtaining redress. Concerning this, the Appellate Division said [*People* v. *Weller, supra,* at p. 342]:

"Ordinarily tickets are not resold at the theatre. One purchasing from a speculator must rely upon him in many respects. If the speculator is dishonest he may sell tickets which will not be honored at the theatre, or tickets for which there is no production to be seen. The purchaser is not on an equal footing with the speculator, and this gives the public an interest in seeing that those engaged in that occupation are persons of character suited thereto, and also in having safeguards provided which will insure protection to the public as well as an adequate remedy to those defrauded."

3. Governor Miller, when signing the act now under consideration, gave expression to a popular sentiment when he said that the bill was aimed at "an undoubted abuse" (see *People* v. *Weller,* 207 N. Y. App. Div., at p. 339).

In passing the bill, the Legislature said that there was a great necessity therefor. By §167, it "declared and determined" that the law was necessary "for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses."

4. Indeed, for many years, the evils attendant upon theatre ticket speculation in Greater New York have been recognized, and various efforts, both public and private, have been exerted in an endeavor to minimize or eliminate them (*Collister* v. *Hayman,* 183 N. Y. 250, 254; *People* v. *Weller,* 237 N. Y., at p. 327). An instance of a private effort to do so is recorded in *Collister* v. *Hayman* (*supra*). There, the proprietor of a theatre attempted to protect his patrons from paying extortionate prices by a clause declaring tickets void if resold on the sidewalk. In upholding the validity of this clause, the Court said [at p. 254]:

"A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this kind frequently leads to abuse, especially when the theatre is full and but few tickets are left, so that extortionate prices may be exacted. A regulation of the proprietor, which tends to protect his patrons from extortionate prices is reasonable and he has the right to make it part of the contract and a condition of the sale. Unless he can control the matter by contract and by conditions appearing upon the face of the ticket which is evidence of the contract, he may not be able to control it at all, *but must leave his patrons to the mercy of speculators,* such as the plaintiff, who, as he alleges, was accustomed to make at least $4,000 a year from his business. That amount, of course, came out of patrons of the theatre and if other ticket speculators carrying on the same business at various theatres in the city of New York are equally successful, the additional expense to theatre-goers must be very large."

5. Further evidence of abuses which flow from the business of reselling theatre tickets is furnished by the legislation that has been passed in a number of States other than New York, aimed at improving the condition surrounding the sale and distribution of tickets.

In 1905, California passed a statute (St. 1905, p. 140, ch. 140), prohibiting any person from selling tickets to theatres or other public places of amusement, for a price higher than that originally charged by the management of such amusement places. This act was held void as infringing on the right of property guaranteed by the Constitution and not a valid exercise of the police power of the State,

in that it prohibited an act which was innocent in character, and which had no tendency to affect, injure or endanger the public health, morals or safety.

Ex parte Quarg, 149 Cal. 79; 84 Pac. 766.

In 1907, Illinois passed a statute (L. 1907, p. 269), substantially similar to the California statute (*supra*). It prohibited the sale of theatre tickets not having thereon the words, "This ticket cannot be sold for more than the price printed thereon", and further prohibited the demanding and receiving therefor a price in excess of the printed rate. On the authority of *Ex parte Quarg* (*supra*), this act was held invalid.

People v. *Steele*, 231 Ill. 340; 83 N. E. 236.
City of Chicago v. *Powers*, 231 Ill. 560; 83 N. E. 240.

In 1915, Chicago passed an ordinance providing that every ticket of admission to a theatre shall have printed upon its face the price thereof, and prohibiting any theatre company, or officer, manager or employee thereof, from receiving, directly or indirectly, any consideration of any nature whatsoever, upon the sale of any such ticket beyond or in excess of the price designated thereon, or from entering into any arrangement or agreement for the receipt of such consideration. This ordinance was held to be Constitutional and a valid exercise of the police power, and the *Quarg, Steele* and *Powers* cases (*supra*), were distinguished upon the ground that the purpose of the statutes therein involved "was to destroy a business not injurious to the public welfare, by prohibiting a broker from making a profit."

People ex rel. Cort Theatre Co. v. *Thompson*, 283 Ill. 87; 119 N. E. 41.

In 1920, San Francisco passed an ordinance which declared unlawful the sale of any theatre ticket, opera ticket, or ticket of admission to a place of amusement or entertainment, at any place other than the office of the management of the theatre, place of amusement or entertainment, unless the seller should first procure a "Ticket Peddler's License", and pay a fee of $300 monthly therefor. Citing with approval *Ex parte Quarg* (*supra*), it was held that the ordinance was not a justifiable revenue measure, and that as an exercise of the police power, it was an "unwarrantable interference with the liberty of citizens, not based upon any reasonable consideration of the public welfare, morals or safety, nor of the cost of police supervision."

Ex parte Dees, 31 Cal. App. 815; 189 Pac. 1050.

The statute involved, as we have already pointed out, was passed in 1922.

During 1923, at least three states passed statutes relating to the sale of tickets to places of amusement: *i. e.*,

Illinois, L. 1923, p. 323.
New Jersey, L. 1923, p. 143, ch. 71.
Connecticut, L. 1923, ch. 48.

The Illinois statute made it unlawful for any theatre or other public place of amusement to sell tickets at any place other than its box office or on the premises, except at the same price at which such tickets were sold at the box office or on the premises.

The New Jersey statute made it unlawful to sell or dispose of any ticket of admission to any theatre or other pub-

lic place of amusement or entertainment at or for a price in excess of that printed on the face thereof.

The Connecticut statute made it unlawful to sell any ticket of admission to any place of public amusement given under the auspices of an educational institution at a price greater than the price of admission to such place of public amusement.

The validity of these statutes has not, so far as we know, been passed upon.

During 1924, while a bill similar to the New York statute now under consideration was pending in the Massachusetts Senate, the advice of the Justices of the Supreme Judicial Court of that State was sought on the constitutionality of the bill. In a carefully considered opinion, in which the opinion of the New York Court of Appeals in *People* v. *Weller* (237 N. Y. 316), was cited with approval, the Senate was advised that the bill, if enacted into the law, would be constitutional.

Opinion of Justices, 247 Mass. 589.

Thereafter, an act was passed, containing the substantial features of the proposed bill. See:

Acts and Resolves of Massachusetts for 1924, ch. 497, p. 551.

6. The conception of different law-making bodies that the business of selling theatre tickets so far affects the public welfare as to require legislative regulation, cannot have been accidental and without cause.

German Alliance Ins. Co. v. *Lewis*, 233 U. S. 389, 412.

Presumably, these various law-making bodies, after investigation, determined that the business should be regulated.

"The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments" (*McLean* v. *Arkansas*, 211 U. S. 539, 547), and this court "ought to be very slow to declare that the state legislature was wrong on the facts" (*Patsone* v. *Pennsylvania*, 232 U. S. 138, 144).

In *Radice* v. *New York* (264 U. S. 292), which involved the constitutionality of a statute prohibiting the employment of women in restaurants between certain hours was upheld, the Court said [p. 294]:

> "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state Legislature here determined that night employment of the character specified was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination."

To the same effect, see:

Jones v. *City of Portland*, 245 U. S. 217, 221.
Block v. *Hirsh*, 256 U. S. 135, 154.
Armour v. *North Dakota*, 240 U. S. 510, 513.
People ex rel. Durham v. *La Fetra*, 230 N. Y. 429, 440.
Schieffelin v. *Hylan*, 236 N. Y. 254, 264-265.

Again, in determining whether local conditions justify state legislation, this Court should not only give great weight to the estimate of the state Legislature as to the existence of evils, but should give a cumulative effect to the recognition of the courts of the same state that those evils exist.

In *Green* v. *Frazier* (253 U. S. 233), the Court said [at p. 242]:

> "Under the peculiar conditions existing in North Dakota, which are emphasized in the opinion of its highest court, if the State sees fit to enter upon such enterprises as are here involved, with the sanction of its constitution, its legislature and its people, we are not prepared to say that it is within the authority of this Court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision."

To the same effect, see:

Jones v. *City of Portland*, 245 U. S. 217.

7. In *People* v. *Newman* (109 N. Y. Misc. 622), which invalidated a city ordinance substantially similar to the statute under consideration, the Court admitted that there was "evil flowing from this business", and that it "should be corrected"; but seemed to think that the evil could only be remedied by theatrical managers (at pp. 660-661).

But, as the Appellate Division pointed out in *People* v. *Weller* (*supra*): "The managers of theatres profess to be unable to cope with the evil, asserting that they have made efforts to do so" (at p. 339); and that, furthermore: "The

hope or expectation that the abuses or evils in theatre ticket speculation may be remedied by the producing managers is dispelled by the testimony in this case" (at p. 347).

A more complete answer is that of the Court of Appeals: "The correction of recognized abuses need not be left to the voluntary action of the very group of men who have created the abuse and who apparently believe that the continuance of such abuses will profit them" (*People* v. *Weller, supra,* at pp. 329-330).

Furthermore, to concede that the only cure for the evil is some remedy initiated by the managers of the theatres is to admit that the State is powerless to promote the general welfare of the people and to accomplish the purposes for which governments are founded (see *People ex rel. Durham* v. *La-Fetra,* 230 N. Y. 429, 442, 443; *People* v. *Weller,* 207 App. Div., at p. 343).

POINT II.

The business of reselling theatre tickets is affected with a public interest, and may be regulated.

The fundamental principles governing the question involved are simple and familiar.

A State Legislature may, acting under its police power, regulate prices and charges. But the extent to which regulation may reasonably go depends upon the nature of business—whether it is "affected with a public interest"; the fact that it closely touches a great many people, and that it may afford opportunities for imposition and oppression, as in cases of monopoly and the like. This power of regu-

lation is not a power to destroy. A State Legislature may not, therefore, compel persons engaged in the business to lend their services without reward. Nor may it establish regulations obviously unjust or discriminating (*vid.* cases cited at p. 38, *infra*).

1. The business of conducting a theatre, though in one sense private, is not "strictly" private; it is a business that is "affected with a public interest" (*People* v. *King*, 110 N. Y. 418, 427; *Aaron* v. *Ward*, 203 N. Y. 351, 356; *People* v. *Weller*, 237 N. Y., at p. 322; *People ex rel. Cort Theatre Co.* v. *Thompson*, 283 Ill. 87; 119 N. E. 41; *Opinion of Justices*, 247 Mass. 589, 595). "The courts have frequently pointed out that the business of conducting a theatre or place of public amusement is 'affected with a public interest'" (*People* v. *Weller, supra*). And it is because the business is affected with a public interest that governmental regulation is justified (*vid.* cases just cited).

That the business of conducting a theatre is affected with a public interest is very evident when the purposes of the theatre are considered. Theatres are operated to furnish recreation and amusement to the public. They are the chief means of recreation which the people have after cessation from their daily labors. The theatres afford that relaxation of mind which is conducive to health, comfort and good morals.

There is also another important function of the theatre in that it promotes public education. As the population becomes more congested in great cities, as the hours of labor become shorter, the necessity of affording recreation, amusement and education to the inhabitants becomes more imperative. Therefore, the theatre becomes more essential

to the welfare of the public; it becomes more "affected with a public interest."

People v. *Weller,* 207 App. Div., at pp. 341-342.

In Greater New York especially, with its 356 theatres, halls and stadiums, public interest in the theatre is unusually important.†

37 Harvard L. R., at p. 1127.

2. Historically considered, theatres may be regarded as "affected with a public interest."

A. E. Haigh, in The Attic Theatre [3rd Ed.], at p. 4, says:

> "To provide for the amusement and instruction of the people was, according to the Greeks, one of the regular duties of a government; and they would have thought it unwise to abandon to private venturers an institution which possessed the educational value and wide popularity of the drama."

At p. 330, it is said:

> "Until the close of the fifth century every man had to pay for his place, although the charge was a small one. But the poorer classes began to complain that the expense was too great for them, and that the rich citizens bought up all the seats. Accordingly, a measure was framed directing that every citizen who cared to apply should have the price of the entrance paid to him by the state. The sum given in this way was called 'theoric money.' It used formerly to be supposed, on the strength of statements

† Marks states that, in two of the five Boroughs of the City of New York (in the Boroughs of Manhattan and Brooklyn alone), there are at least 108 first-class theatres and 598 moving picture theatres (p. 24).

in Plutarch and Ulpian that this theoric system was introduced by Pericles. But the recently discovered Constitution of Athens has now shown that it was of much later date."

See also:

Donaldson, Theatre of the Greeks, at pp. 309-310.

15 Amer. Cyc., pp. 685-686.

In Rome, theatres were regulated by law. "The seats were allocated by the state and the care of the building committed to certain magistrates."

26 Ency. Brit. [11th Ed.], p. 736.

The operation of a theatre was a proper municipal purpose. "Municipalities were encouraged to build theatres."

26 Encyc. Brit., p. 736.

In England, theatre licensing dates back to Henry VIII.

Wandell, Law of the Theatre, at p. 3.

And in the United States, theatres have been subject to governmental regulation from earliest times.

Opinion of Justices, supra.
People ex rel. Cort Theatre Co. v. *Thompson, supra.*
Cecil v. *Green,* 161 Ill. 265; 43 N. E. 1105

Indeed, the theatre was not favored in colonial and early provincial Massachusetts. They were, at first, strictly forbidden. Licensing began in 1805.

Opinion of Justices, supra.

The modern trend is shown by the following excerpt from Ruling Case Law (Vol. 19, p. 722):

"The trend of authority, in more recent years, has been in the direction of permitting municipalities a wider range in undertaking to promote the public welfare or enjoyment. Thus, the appropriation of money for public concerts has been held to be proper. So, too, the erection of an auditorium has been regarded as properly falling within the purposes for which a municipal corporation may provide. Generally speaking anything calculated to promote the education, the recreation or the pleasure of the public is to be included within the legitimate domain of public purposes, and on this ground it has even been held that authority to erect and conduct an opera house may be conferred upon a municipal corporation."

See also:

Egan v. *San Francisco,* 165 Cal. 576; 133 Pac. 294, 295, 296;
Los Angeles v. *Dodge,* 197 Pac. [Cal.], 403, 406, 407.
Schieffelin v. *Hylan,* 236 N. Y. 254, 265, 266.

3. In *People ex rel. Cort Theatre Co.* v. *Thompson* (*supra*), the Court said:

"The business of the theatre owner or manager is private in the sense that no franchise from the state is required, but it is no more private than the business of hawkers, peddlers, pawnbrokers, keepers of ordinaries, circuses, or other shows and amusements which invite the public generally to attend and exist entirely by the public. A place of amusement to which the public are generally invited upon no condition but the payment of a fixed charge is public in a general sense, and it differs radically

from accommodations offered by a merchant or professional man, who, while he invites everyone to enter, does so only for the purpose of selling to each individual services or merchandise."

In *Opinion of Justices* (*supra*), it is said:

"The right to set up and maintain theatres and other places of public amusement is not natural and inherent. Working by an artisan at his trade, carrying on an ordinary business, or engaging in a common occupation or calling cannot be subjected to a license fee or excise. These plainly are not affected with a public interest. *Gleason* v. *McKay,* 134 Mass. 419, 425. *O'Keeffe* v. *Somerville,* 190 Mass. 110, 112, 113. *Chas. Wolff Packing Co.* v. *Industrial Court,* 262 U. S. 522. Theatres and places of public amusement as to maintenance and operation are different in nature. * * * Numerous reasons lead to the conclusion that the maintenance of theatres and other places of amusement is for the use of the public and affected with a public interest. The character of the performances presented has an intimate connection with the preservation and promotion of public morality. Some theatrical presentations are injurious and some are beneficial to public morals. Although their entertaining and recreative features are commonly more emphasized than any other, they also have or are susceptible of distinctly educative functions. Some are highly instructive and enlightening. Some inspire emotions of patriotism, philanthropy and good will. They have a tendency to gather at one time large numbers of people under a single roof and under comparatively crowded conditions. These factors have intimate relation to the health, safety and good order of the community. In these particulars such places require constant supervision and inspec-

tion in the interests of the public at large in order to prevent disaster by fire and accident, spread of disease and general and individual disorder and crime. The construction and maintenance of buildings devoted to such uses demand approval and oversight by public officers acting for the general welfare. * * * In the light of their history in this commonwealth, but without resting wholly upon that ground, we are of opinion that theatres and other places of public amusement are affected with a public interest and devoted to a public use. There are decisions in other jurisdictions to this effect. *People* v. *King*, 110 N. Y. 418, 428. *Donnell* v. *State*, 48 Miss. 661, 680, 681. *Aaron* v. *Ward*, 203 N. Y. 351, 356. See *Civil Rights Cases*, 109 U. S. 3, 41, 42."

In the opinion below, it is said [R., 59-60]:

"That the business of catering to the entertainment and amusement of the public is affected with a public interest seems apparent. It has been so recognized from antiquity. * * * As to modern times, the public nature of the business is hardly open to argument. That hundreds of thousands of people daily attend theatrical performances, athletic contests, musical recitals, and other forms of amusement and entertainment, is a matter of common knowledge. That an even greater number of the public follows, with keen interest, the displays of strength, skill and ability of various kinds which take place in college and professional stadiums, in theatres and other similar places of resort, is evidenced by the amount of space devoted by the public press to the news of such occurrences and events. None now denies the right of appropriate authorities to license places of public entertainment and to limit, within reason, the fire and building hazards to which the public may

there be subjected. Supervision and control may also be exercised over performances which offend the public sense of decency, and the legislature may prohibit owners of amusement places from enforcing discriminatory regulations with respect to persons who may seek admission thereto. *People* v. *King*, 110 N. Y. 418; *Aaron* v. *Ward*, 203 N. Y. 351, 356. By reason of these considerations, as well as others, of a similar nature, theatres, 'require more or less of governmental supervision and regulation.' *People ex rel. Duryea* v. *Wilber*, 198 N. Y. 1, 9. See also *Mutual Film Corporation* vs. *Ohio Industrial Commission*, 236 U. S. 230."

4. The evidence shows an intimate relationship between persons engaged in operating theatres and those engaged in reselling theatre tickets; the control by "a dozen or fifteen" brokers of approximately two million theatre seats a year, or at least half of the choicest tickets, and the existence of fraud, extortion, exorbitant rates and similar abuses in the business (*vid.* Point I, *supra*).

Now, as attending places of amusement constitutes one of the chief means of recreation of the inhabitants of the city, and as the business of reselling theatre tickets is closely connected with that of conducting places of public amusement, it naturally follows that, if the business of conducting a theatre is a business affected with a public interest, that of reselling theatre tickets is also so affected.

Opinion of Justices, supra.
People v. *Weller, supra.*

And assuming that the business may not, in its origin, have been affected with a public interest, yet because of

the abuses which have grown up in connection with it, it has become so affected.

In *German Alliance Ins. Co.* v. *Lewis* (*supra*, at p. 411), the language of the Court was:

> "The cases need no explanatory or fortifying comment. They demonstrate that a business by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge ANDREWS in *People* v. *Budd* (117 N. Y. 1, 27), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported. '*The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.*' "

It may be said of this business as was said of the insurance business that, "having become 'clothed with a public interest,' " it is "subject 'to be controlled by the public for the common good' " (*German Alliance Ins. Co.* v. *Lewis, supra*, at p. 415).

5. The Legislature of New York has solemnly "determined and declared", by §167 of the statute under consideration, that:

> "the price of a charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held *is a matter affected with a public interest* and subject to the supervision of the

state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses."

Although "the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified" (*Wolff Packing Co.* v. *Industrial Court, supra,* at p. 536; *People* v. *Weller,* 237 N. Y., at p. 324); "yet the indication by the legislature of its own purposes may certainly, in some degree, guide the courts in their consideration of the validity of the legislative assertion of power" (*People* v. *Weller, supra;* and see *Block* v. *Hirsh,* 256 U. S. 135, 154; *Opinion of Justices, supra*).

POINT III.

The price-fixing provision is reasonable and appropriate to correct existing evils.

Having established that the business of reselling theatre business is "affected with a public interest", and that any business so affected may be regulated, the question still remains whether price-fixing is reasonable and appropriate to correct the evils associated with that business.

We may say, at the very outset, that there is no dispute as to the constitutional principles governing the question involved. They are, as we have already remarked, simple and quite familiar. The difficulty is in the application of the principles.

1. As we have already pointed out, the general principle is that a State Legislature may, under its police power,

regulate prices and charges; that the extent to which regulation may reasonably go depends upon the nature of the business—whether it is "affected with a public interest"; the fact that it closely touches a great many people, and that it may afford opportunities for imposition and oppression, as in cases of monopoly and the like.

Munn v. *Illinois*, 94 U. S. 113.
Budd v. *New York*, 143 U. S. 517.
Brass v. *Stoeser*, 153 U. S. 391.
German Alliance Inc. Co. v. *Lewis*, 233 U. S. 389.
Block v. *Hirsh*, 256 U. S. 135.
Marcus Brown Co. v. *Feldman*, 256 U. S. 170.
Wolff Packing Co. v. *Industrial Court*, 262 U. S. 522.

We quote from some of the cases.

In the leading case *Munn* v. *Illinois* (*supra*), Chief Justice WAITE, speaking of "police powers," said [pp. 125-126]:

> "Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that

such legislation came within any of the constitutional prohibitions against interference with private property. * * * From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation. This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that *when private property is 'affected with a public interest, it ceases to be juris privati only'*. This was said by Lord Chief Justice HALE more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78 and has been accepted without objection as an essential element in the law of property ever since. *Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus creaetd. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.*"

At p. 134, the Court said:

> "The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charges, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use."

In *Wolff Packing Co.* v. *Industrial Court* (*supra*), Chief Justice TAFT said [p. 535]:

> "Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:
>
> "(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.
>
> "(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and gristmills [citing cases].
>
> "(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. *In the language of the cases, the owner by devoting his business to the pub-*

lic use in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly'' [citing cases].

Cited under the third head (*supra*) are the familiar cases of:

Munn v. *Illinois, supra.*
Spring Valley Water Works v. *Schottler,* 110 U. S. 347.
Budd v. *New York, supra.*
Brass v. *Stoeser, supra.*
Noble State Bank v. *Haskell,* 219 U. S. 104.
German Alliance Ins. Co. v. *Lewis, supra.*
Van Dyke v. *Geary,* 244 U. S. 39.
Block v. *Hirsh, supra.*

Continuing, TAFT, C. J., said:

"In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest', as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. *The circumstances which clothe a particular kind of business with a public interest,* in the sense of *Munn* v. *Illinois* and the other cases, *must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public* (at p. 538).

"In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation. * * * It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become 'clothed with a public interest.' All business is subject to some kinds of public regulation; but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction. * * *

"To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. *It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared.* To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation" (at pp. 538-539).

In *People* v. *Weller* (*supra*), the Court of Appeals said [pp. 321-322]:

> "When the attempted exercise by the legislature of the power to regulate certain kinds of business and especially to fix prices was first challenged in the courts, the courts laid down the general rule that the power to regulate and fix prices depends upon whether the business is so 'clothed with a public interest' as to justify reasonably the imposition of regulations calculated to remove abuses, or perhaps even to secure benefits, in regard to features which clearly affect the public. This general rule is now well recognized but the limits of its application are still somewhat shadowy and indefinite. * * * Decisions of this and other courts since that time have merely tended by the process of inclusion and exclusion to indicate the nature of the 'special conditions and circumstances' which may bring a business within principles which justify legislative control and regulation, and these cases may be referred to profitably only in so far as the 'special conditions and circumstances' considered therein are analogous to the special conditions and circumstances under consideration by us" [pp. 321-322].

2. Price fixing is old. In England, it may be traced back to the statutes forbidding regating, engrossing and forestalling (*People* v. *Weller*, 237 N. Y., at p. 328). Through them, Parliament sought to preserve freedom of trade by prohibition of acts which tend to restriction of free competition between the traders themselves, and "to prevent any man or set of men from possessing the power to arbitrarily determine the price at which an article of common use shall be sold *because he who controls prices is*

the master of the world" (*People* v. *Weller, supra; State* v. *Duluth Board of Trade,* 107 Minn. 506, at p. 529).

According to *Munn* v. *Illinois,* "it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold" (at p. 125).

Since *Munn* v. *Illinois* (1876), this method of regulation has been familiar in all American courts, and many kinds of businesses carried on without special franchises or privileges have been treated as public in character, and declared subject to legislative control.

In *Ratcliff* v. *Stockyards Co.* (74 Kan. 1; 86 Pac. 150), the Court said [at p. 7]:

> "Many kinds of business carried on without special franchises or privileges are treated as public in character, and have therefore been subjected to legislative regulation and control. * * * Public necessity and the public welfare are the broad general grounds upon which the right of legislative control is based, rather than that a special privilege has been conferred in consideration of which public control is conceded or required. * * * Upon these considerations the business of banking has been subjected to control, and the right to regulate the interest which may be charged for the use of money is now unquestioned. The police power is exercised in controlling the business of insurance, the operation of mills, hotels, theatres, wharves, markets, warehouses for the storage of grain and tobacco, common carriers, the collection and distribution of news, and

> the business of supplying and distributing water and gas. Some of these rest upon considerations of health, or the safety or the convenience of the people, but all fall within the general grounds of public necessity and public welfare."

In *Opinion of Justices* (*supra*), many instances are given of the establishment of prices by public authorities in connection with businesses affected with a public interest other than those of common carriers and those requiring use of the public ways. The Court points out that:

> "Usury laws which fix the price for the use of money have been upheld when directly assailed. *Griffith* v. *Connecticut*, 218 U. S. 563; *Missouri Kansas & Texas Trust Co.* v. *Krumseig*, 172 U. S. 351; *Holcombe* v. *Creamer*, 231 Mass. 99, 105. If these laws are to be upheld only in the light of the common law history of interest for the use of money, *Munn* v. *Illinois*, 94 U. S. 113, 153, 154; *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 432, 433, we are of opinion that in view of the history of the theatre in this commonwealth it stands on the same footing. There are examples of more or less definite fixing of prices in connection with licensing to be found in our statutes. For example, return under certain conditions of a percentage of the fee collected by managers of intelligence offices, G. L. c. 140, §§43, 44; interest to be charged by pawnbrokers, G. L. c. 140, §72; interest to be charged on loans of less than $1,000. G. L. c. 140, §90; interest to be charged on loans of $300. or less, T. L. c. 140, §§96 and 100. The constitutionality of such statutes, when attacked has been sustained. It was held in *Dewey* v. *Richardson*, 206 Mass. 430, that St. 1908, c. 605, §1, limiting the rate of interest legally to be

> charged on unsecured loans for less than $200 was constitutional. Similar laws as to pawnbrokers have been upheld. *Commonwealth* v. *Danziger,* 176 Mass, 290. Regulation of rates for hackney carriages are permissible. *Commonwealth* v. *Page,* 155 Mass. 227; *Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S. 252. Rates of common carriers and other co-called public service corporations are subject to public regulations. *Donham* v. *Public Service Commission,* 232 Mass. 309. Under the Workmen's Compensation Act fees of attorneys are regulated, *Gritta's Case,* 241 Mass. 525, 135 N. E. 114; and also of physicians, *Panasuk's Case,* 217 Mass. 589; *Uuxen's Case,* 226 Mass. 292."

In the opinion below, it is said that "the right of the public to resort to public places of entertainment without being subjected to imposition and oppression at the hands of a small group of persons who control a substantial portion of the limited seating capacity of such places of public entertainment, is as much entitled to protection and preservation as is its right to enjoy less essential advantages and conveniences which are admittedly subject to regulatory legislation." As illustrations, the following examples are given [R. 62-63]:

> "For example, taxicab and omnibus fares have long been the subject of fixation by appropriate authorities. Yet, under conditions as we now know them, such fares affect only those who desire special facilities and conveniences in the way of transportation. Extortionate rates, if charged, would not deprive a substantial portion of the public of a means of travel to and from their places of residence and business. The ordinary facilities of transportation would still exist and be available to all upon equal

terms. If, in answer to this statement, it be said that the State's right of regulating public service utilities arising out of special circumstances, and has, as its basis, the grant of privilege conferred by the public, the reply will be that such is not the controlling principle. See *People* v. *Budd*, 171 N. Y. 1, 27. And, at no previous time did the Government possess greater power to recognize the interest in a particular business than it does today. *German Alliance Insurance Co.* v. *Kansas*, *233 U. S. 389, 411.* To a certain extent, the law is a progressive science, *Holden* v. *Hardy*, 169 U. S. 366, and as indicative of the fact, it is now held lawful for a state to regulate rates to be charged for insurance contracts, *German Alliance Ins. Co.* v. *Kansas*, *supra;* the hours of labor in mines and underground working, *Holden* v. *Hardy*, *supra;* the number of hours per day that women may work in laundries, *Muller* v. *Oregon*, 208 U. S. 412; the maximum rates to be charged for the loan of money, *Griffith* v. *Connecticut*, 218 U. S. 563; the making of assignments of wages for security of debts of less than $200, *Mutual Loan Co.* v. *Martell*, 222 U. S. 225; the making and selling of bread, *Schmidinger* v. *Chicago*, 226 U. S. 577 contracts limiting liability for injuries in advance of the injury received. *C. B. & Q. R. R.* v. *McQuire*, 219 U. S. 549; and a State may also compel banks within its jurisdiction to contribute to a guaranteed fund to protect deposits. *Noble State Bank* v. *Haskell*, 219 U. S. 104. These cases mark the development of the principles enunciated in the grain elevator litigation, 94 U. S. 113, and plainly show that State regulation may properly be applied to any business as and when, by circumstances and it nature, it rises from private to public concern. That is exactly what has happened with respect to public exhibitions and performances that are intended to entertain and amuse the public."

And we may add that, in a recent case, a statute providing for the qualifications and regulating charges of newspapers for the publication of legal notices in cities of over 100,000 inhabitants was held not unconstitutional as interfering with the freedom of contract, "because it is a rate paid for a necessary service in the administration of justice which may be taxed as costs; and because the statute, properly construed, does not prevent a contract for a different rate" (*State ex rel. Sekyra* v. *Schmoll,* Mo. ; 282 S. W. 702, 706).

The illustrations given in the cases cited show that the doctrine of the *Munn* case has not only been adhered to, but has been expanded and advanced to meet conditions as they arose. This is also shown by PROF. BURDICK'S able summary of the history of the cases in which the doctrine case was applied (Burdick, Law of the American Constitution, §272). Thus, after stating that common carriers and innkeepers, as survivors of the ancient common callings, are under a duty to serve the public reasonably within the scope of their business, and that a similar duty is, by the common law, put upon those who are the recipients of the franchises of eminent domain or of the use of streets or highways, he says [§272]:

> "It is quite clear that reasonable rates and practices may be established for these businesses by legislation, for this is but defining existing duties for the protection of the public. However, the Supreme Court has gone further, and has held that a State Legislature may under the police power impose a duty to serve at reasonable rates upon business not previously under that duty. In *Munn* v. *Illinois* [94 U. S. 113] and *Budd* v. *New York* [143 U. S.

517] it was held with regard to grain elevators, that the use of and profits from property could be regulated when the business is of great importance to the public and monopolistic in tendency, so that the public are in danger of oppression. In the first case two, and in the second case three justices dissented on the ground that such regulation not being for the protection of health, safety or morals could only be imposed upon businesses exercising a public use, as distinguished from those exercising a use in which the public has an interest, that is, that a business could only be so regulated which a state might carry on, or which was invested with powers reserved to the state such as eminent domain. In *Brass* v. *North Dakota* [153 U. S. 391] monopolistic conditions were declared not to constitute a necessary basis of such police regulations; it is enough if the business in question is of great public importance. In this case four justices dissented on the ground that where no monopolistic tendency is shown the doctrine of the preceding cases did not apply, and the need of the public for protection was not apparent. Although the strong dissent in the *Brass* case left somewhat in doubt for a time the very broad doctrine of the majority, this doubt seems to have been set at rest by the case of *German Alliance Insurance Company* v. *Kansas* [233 U. S. 389] in which the doctrine of the *Brass* case was expressly approved and applied to the insurance business. These same principles were held by the New York Court of Appeals and the Supreme Court of the United States to apply to rented property, and to justify the New York legislature during the building shortage after the Great War, in restricting landlords in New York City to the receipts of a reasonable rental, irrespective of the rent agreed upon"

(citing *People ex rel. Durham* v. *LaFetra*, 230 N. Y. 429; *Marcus Brown Co.* v. *Feldman*, 256 U. S. 170).

Prof. Burdick then concludes his summary of these cases by the observation [§272]:

> "Though it is declared to be 'fundamental that private business may not be regulated, and may not be converted into public business by legislative fiat',† we certainly have a very liberal view taken of what makes a business public in character, and we have the police power put in these cases upon a very broad foundation."

3. In *Opinion of Justices* (*supra*), the Court said that "theatres and other places of public amusement" "fall either in the class which can be carried on only by authority of a public grant with the correlative duty of rendering public service, or in that exceptional class recognized for historical reasons as impressed with a public interest, like money lenders, keepers of inns, cabs and grist mills"—in classes designated (1) and (2) in *Wolff Packing Co.* v. *Industrial Court* (*supra*, at p. 535).

It seems to us that theatres and other places of public amusement and the allied business of reselling tickets to such places also fall within the class designated (3) in *Wolff Packing Co.* v. *Industrial Court* (*supra*)—within which class come the *Munn* and other cases (*supra*). That business, it seems to us, is so concerned with the amusement, recreation and education of the people that it can be likewise said, paraphrasing the language of the *Wolff* case, that

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† Citing *Producers' Transp. Co.* v. *R. R. Comm.*, 251 U. S. 228, 230; *People ex rel. Durham* v. *LaFetra*, 230 N. Y. 429, 442. (And see, *Frost* v. *R. R. Comm.*, U. S. ; 70 L. Ed. 683).

"the thing which (gives) the public interest (is) the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation" (*Wolff Packing Co.* v. *Industrial Court, supra,* at p. 538).

Thus in *People* v. *King* (110 N. Y. 418), the question involved was as to the constitutionality of a statute securing "equal enjoyment of any accommodation, facility or privilege furnished by inn-keepers or common carriers, *or by owners, managers, or lessees of theatres or other places of amusement,* by teachers and officers of common schools and public institutions of learning, or by cemetery associations" (at pp. 420-421). The statute was upheld, largely upon the authority of *Munn* v. *Illinois* (*supra*), and the decision established the proposition that places of public amusement fall in the same category as those businesses referred to in the *Munn* case. The Court said [at pp. 427-428]:

> "By the common law, innkeepers and common carriers are bound to furnish equal facilities to all, without discrimination, because public policy requires them so to do. The business of conducting a theatre or place of public amusement is also a private business in which any one may engage, in the absence of any statute or ordinance. But it has been the practice, which has passed unchallenged, for the Legislature to confer upon municipalities the power to regulate by ordinance the licensing of theatres and shows, and to enforce restrictions relating to such places, in the public interest, and no one claims that such statutes are an invasion of the right of liberty or property guaranteed by the Constitution. The statute in question assumes to regulate the conduct

of owners or managers of places of public resort in the respect mentioned. The principle stated by WAITE, Ch. J., in *Munn* v. *Illinois* (94 U. S. 113, which received the assent of the majority of the court, applies in this case. 'Where', says the chief justice, 'one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.' In the judgment of the Legislature the public had an interest to prevent race discrimination between citizens, on the part of persons maintaining places of public amusement, and the quasi public use to which the owner of such a place devoted his property, gives the Legislature a right to interfere."

In *Aaron* v. *Ward* (203 N. Y. 351) the Court said [pp. 355-357]:

"In several of the reported cases the keeping of a theater is spoken of as a strictly private undertaking, and it is said that the owner of a theater is under no obligation to give entertainments at all. The latter proposition is true, but the business of maintaining a theater can not be said to be 'strictly' private. In *People* v. *King* (110 N. Y. 418) the question was as to the constitutionality of the Civil Rights Act of this state which made it a misdemeanor to deny equal enjoyment of any accommodation, facilities and privileges of inns, common carriers, theaters or other places of public resort or amusement regardless of race, creed or color, and gave the party aggrieved the right to recover a penalty of from fifty to five hundred dollars for the offense. The statute was upheld on the ground that under the doctrine of *Munn* v. *Illinois* (94 U. S. 113) theaters

> and places of public amusement (the case before the court was that of a skating rink) *were affected with a public interest which justified legislative regulation and interfere* * * * That public amusements and resorts are subject to the exercise of this legislative control shows that they are not entirely private."

In his dissenting opinion in the *Civil Rights Cases* (109 U. S. 3), MR. JUSTICE HARLAN quoted from *Munn* v. *Illinois*, and said [at p. 42]:

> "The doctrines of *Munn* v. *Illinois* have never been modified by this court, and I am justified, upon the authority of that case, in saying that places of public amusement, conducted under the authority of the law, are clothed with a public interest, because used in a manner to make them of public consequence and to affect the community at large."

However, in *Opinion of Justices* (*supra*), the Court said:

> "In advising as to the constitutionality of the proposed statute we do not rely in this connection upon cases like *Munn* v. *Illinois*, 94 U. S. 113, and *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, which rest upon more extreme ground."

Be that as it may, it seems to us that whether the theatre business falls within the class of businesses designated in the *Wolff* case as class (1) or that designated as (2) or that designated as (3) is wholly immaterial, provided it comes within one of these classes, and is affected with a public interest. And that it is so affected and comes within one of those classes there can be no doubt.

4. Some of the earlier cases seem to hold that the right to fix reasonable rates to protect the public follows when a business is affected with a public interest (*Munn* v. *Illinois, supra,* at p. 134; *Block* v. *Hirsh, supra,* at p. 157; see, also, *People* v. *Weller,* 207 App. Div., at p. 350). "The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied" (*Munn* v. *Illinois, supra*). "If the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulations has been settled since *Munn* v. *Illinois*" (*Block* v. *Hirsh, supra*).

The more recent cases in this Court lean towards the view that the fact that a business is affected with a public interest does not, of itself, justify every kind of regulation, including price-fixing (*Wolff Packing Co.* v. *Industrial Court, supra,* at pp. 538-539; *Dorchy* v. *Kansas,* 264 U. S. 286).

> "To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. • • • It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. • • • The extent to which regulation may reasonably go varies with different kinds of business" (*Wolff Packing Co.* v. *Industrial Court, supra*).

The Court of Appeals in *People* v. *Weller* (*supra*), the Supreme Judicial Court of Massachusetts in *Opinion of Justices* (*supra*) and the Court below, applying the doctrine

of the *Wolff* and *Dorchy* cases (*supra*), concluded that the rate-fixing provision of the statute under consideration was constitutional.

In *Opinion of Justices* (*supra*), the Court said:

> "The circumstance that a business is affected with a public interest does not make legally possible every legislative regulation. All such regulations must be reasonable in their nature, directed to the prevention of real evils and adapted to the accomplishment of their avowed purpose. Under the guise of protecting the general welfare there cannot be arbitrary interference with business or irrational or unnecessary restriction. When it becomes established that a business is subject to legislative regulation because affected with a public interest and devoted to a public use, incidental and accessory features reasonable in scope and fair in aim fall under the same rule."

In *People* v. *Weller* (*supra*), the Court of Appeals said:

> "Yet, obviously, the mere fact that the public interest in preventing race discrimination between citizens, in places of public resort, or in the maintenance of good order in such places justifies legislative regulation, which will reasonably tend to serve the public interest in these respects, is by no means decisive of the question of whether abuses reasonably to be feared from unrestricted and unregulated resales of theatre tickets, so closely affect the public interest as to place the regulation of the business of reselling tickets within the legislative control, to the extent of permitting the legislature to limit the price which may be demanded or received upon such resale" (p. 323).

5. In the case at bar, price-fixing is justified because of the existence of a virtual monopoly, and the consequent evils of "extortion, exorbitant rates and similar abuses (*vid.* Point I, *supra*). And this primarily is due to the fact that the sale of all desirable tickets which are not back of the "fifteenth or sixteenth row" are controlled by "probably a dozen or fifteen" brokers or speculators.

At the very outset, we desire to point out the quite obvious fact that, when evils are admitted, great discretion should be allowed the legislature in devising remedies. If it has been demonstrated by experience that a remedy is not sufficient to check the evil, then certainly the legislature can, under the police power, adopt a new and more drastic remedy. It cannot be in such a case that the legislature is powerless.

This power to adopt new remedies when old remedies fail is illustrated by the legislation as to lotteries, carrying concealed weapons and regulating the sale of intoxicating liquors.

Thus, a statute that made it a crime for a person to have in his possession lottery tickets without regard to the person's knowledge of what the articles were, has been held to be within the police power and not to deprive the accused of liberty without due process of law (*Ford* v. *State*, 85 Md. 465; 37 Atl. 172). In the case just cited, the Court said:

> "An examination of our statutes will show numerous efforts on the part of our legislatures to prevent the lottery business from being carried on in this state."

Therefore, it would seem that the above drastic statute was upheld on the ground that other statutes had failed to prevent "the lottery business."

In *Noble State Bank* v. *Haskell* (219 U. S. 104, 110), a statute of Oklahoma compelling a state bank to contribute to a guarantee fund to protect deposits was held constitutional although there was "no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business." The Court seemed to hold that this remedy was appropriate to prevent the evils that the Oklahoma legislature anticipated from "free banking."

We have shown that there have been many attempts to regulate the theatre ticket business not only in this State but in other States (*vid.* Point II, *supra*), and that, in the City of New York, a private attempt was made by the proprietor of a theatre to protect his patrons from paying extortionate prices by a clause declaring the ticket void if resold on the sidewalk (*Collister* v. *Hayman,* 183 N. Y. 250).

And after the decision in *Collister* v. *Hayman* (*supra*), an ordinance was passed excluding ticket sellers from carrying on their business "on or in any street in the city."

> Code of Ordinances of the City of New York, Chapter 3, Art. 1, §12.

See also:

> New York Penal Law, §1534 (Added by L. 1921, Ch. 12).

Yet, as the evils associated with the business continued —and especially the charging of extortionate rates—the Legislature was under a duty to pass the present statute and fix a rate. Its inaction would have been a confession that it was "powerless to secure to its citizens the blessings of freedom and to promote the general welfare."

> *People ex rel. Durham* v. *La Fetra,* 230 N. Y. 429, 443.

Under the circumstances, what remedy is more appropriate than a price restriction?

Does not such a legislative provision reasonably tend to prevent the evils suffered by the public?

People v. *Schweinler Press,* 214 N. Y. 395, 406.

Do not the "means adopted bear a reasonable relation to the end sought to be accomplished"?

State v. *Harper,* 148 Wis. 57; 196 N. W. 451.

Is there any doubt "that the means are reasonably necessary for the accomplishment of the purpose"?

Lawton v. *Steele,* 152 U. S. 133, 137.

For this recognized evil has any one been able to suggest an effective remedy other than a restriction of the price?

We submit that, under the circumstances disclosed by the record, the remedy is proper and reasonable.

6. It is well settled that the existence of a virtual monopoly gives the legislature power to regulate rates (*vid.* cases cited at pp. 38, 41, *supra*).

In *Spring Valley Water Works* v. *Schottler* (*supra*), the Court said [at p. 354]:

> "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in *Munn* v. *Illinois.*"

In *Budd* v. *New York* (*supra*), the Court said [at p. 537]:

"In *Sinking Fund Cases*, 99 U. S. 700, 747, Mr. Justice BRADLEY, who was one of the justices who concurred in the opinion of the court in *Munn* v. *Illinois*, speaking of that case, said: 'The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power.' Although this was said in a dissenting opinion in *Sinking Fund Cases*, it shows what Mr. Justice BRADLEY regarded as the principle of the decision in *Munn* v. *Illinois*."

In *Ratcliff* v. *Stockyards Co.* (*supra*), the Court said that:

"The nature and extent of the business, the fact that it closely touches a great many people and that it may afford opportunities for imposition and oppression," *as in cases of monopoly and the like*, are circumstances affecting property with a public interest.

The conditions in the case at bar are similar to those which led this Court to hold in *German Alliance Ins. Co.* v. *Lewis* (233 U. S. 389) that the business of insurance is so far affected with a public interest as to justify legislative regulation of its rates. At pages 416-417, the Court said:

"We may venture to observe that the price of insurance is not fixed over the counters of companies by what Adam Smith calls the higgling of the market,

> but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that 'it is illusory to speak of a liberty of contract'."

"Extortion, exorbitant rates and similar abuses" cannot be eliminated by competition. Unless the price can be controlled by legislation, the public must be left "to the mercy of speculators" (*Collister* v. *Hayman,* 183 N. Y. 250, 254; *People* v. *Weller,* 237 N. Y., at pp. 327, 328).

To quote the words of this Court in *Brazee* v. *Michigan* (241 U. S. 340, 343), relative to employment agencies:

> "The general nature of the business is such that unless regulated many persons may be exposed to misfortune against which the legislature can properly protect them."

7. In the case at bar, the Court below held that a regulatory statute such as is involved herein "is wholly justified", when "such conditions exist" as are disclosed by the record "and the legislature realizes that a large portion of the public, unless willing to meet the extortionate and arbitrary demands of a small group of ticket speculators, will be deprived of the right to be entertained, amused and, occasionally, educated by public exhibitions, which should be open to all upon equal terms" (R., 61); and that "the right of the public to resort to public places of entertainment without being subjected to imposition and oppression at the hands of a small group of persons who control a substantial portion of the limited seating capacity of such

places of public entertainment, is as much entitled to protection and preservation as is its right to enjoy less essential advantages and conveniences which are admittedly subject to regulatory legislation" (R., 62).

The decision of the Court of Appeals in *People* v. *Weller* (*supra*) is based upon substantially the same grounds as the decision of the Court below—that is, that the price-fixing provision is valid "only if the real abuse which the legislature has found exists, or is reasonably to be feared, * * * is the abuse of unreasonably high or 'exorbitant rates' charged for a quasi-public service" (at p. 326).

In this connection, we quote extensively from the learned opinion of the Court of Appeals.

Discussing Marks' testimony (quoted pp. 12-16, *supra*), the Court said (at p. 327):

> "Under these circumstances it cannot be doubted that when ticket brokers or speculators are permitted to charge any price which they can obtain from a buyer upon the resale of tickets of admission, abuses are not only reasonably to be feared, but actually exist."

Continuing, the Court said [p. 329]:

> *"The same respect for individual liberty, which should ordinarily deter the legislature from an attempt to restrict freedom, might under special circumstances impel the legislature to seek remedy for conditions which, unless controlled, will leave the patrons of the theatre 'to the mercy of speculators.'"* †

† See *Collister* v. *Hayman* (183 N. Y. 250, at p. 254).

Speaking of "liberty of contract", the Court said [at pp. 328-329]:

> "The liberty of the individual citizen to contract freely should be jealously guarded even from encroachments by the state, and where barter is free and demand creates supply perhaps economic laws and not the fiat of the state is the proper corrective of exorbitant prices; but where the liberty of the individual citizen to contract freely has been restricted by the circumstance that a man or group of men has obtained control of the supply of a commodity which the public desires or commonly uses, and this control is used to compel the individual to pay any price which may be demanded though that price be far beyond the price which would be fixed by free contract between consumer and producer, a legislative mandate which regulates the exercise of the compulsive force may in effect *restore* and *not diminish* the liberty of the individual."

Again, the Court said [328-329]:

> "The power of the legislature in a proper case to 'promote the public welfare' by regulating or restricting acts which interfere with free negotiation between the consumers and producers of a commodity in common use and impede the operation of the laws of supply and demand should not be doubted (see opinion of Chief Justice WHITE in *Standard Oil Co.* v. *United States*, 221 U. S. at pages 50 to 58), *and we see no distinction in principle between commodities and privileges or licenses, such as tickets of admission, if there exists a general public demand for them and they are in common use.*"

Upon the assumption that it might be "impossible", if not "unwise", "to attempt to define in general terms the circumstances which may justify legislative intervention or the degree of regulation which is reasonable" (at p. 329), the Court said [at p. 329]:

> "But in the present case the fact that the business of conducting places of public amusement has always been regarded as affected with a public interest, at least to the extent that it is 'competent for the State to impose the condition that the proprietor shall admit or accommodate all persons impartially' (*Cooley on Torts* [2d ed.], 336); the evidence that the ticket brokers or speculators at least in the City of New York, with or without the concurrence of the theatre managers, purchase in advance so many of the seats in the orchestra of all the theatres that the general public cannot purchase at the box office seats in the first fifteen rows and are compelled to purchase these seats, if at all, from the ticket brokers; and the fact that the public desire for admission to places of amusement is so great that exorbitant prices for tickets of admission far beyond those charged by the producers can be extorted from the general public by reason of this control of the supply by the brokers, in our opinion clearly justify reasonable restrictions by the legislature upon the business of reselling such tickets."

The Court then added [at p. 329]:

> *"The legislature has the power to regulate reasonably acts which lead to abuses, through which the general public is compelled to pay a group of men for services which, at least in part, are not desired*

by the public, especially where such acts occur in a business which is measurably affected with a public interest.''

Then, assuming the interest of the public in the business of conducting places of amusement might not, in itself, be sufficient to justify regulation of price, the Court said that ''a statute which reasonably limits the amount which brokers may charge upon the resale of a ticket in order to end the abuse of extortion of large additional amounts by reason of control of the supply should not be condemned merely because the legislature has seen fit to use price regulations as the instrument which may accomplish the desired purpose'' (at pp. 330-331), and added [at p. 331]:

> ''Even though the ultimate purpose of statutes which regulate prices may be the protection of the public from excessive charge, alike where the price regulation is directed against the abuse of extortion through control of supply, by one who does not produce the supply, and where the price regulation is directed against the alleged abuse of unreasonably high prices secured by a producer through negotiation; yet in the one case the statute restricts the freedom of the individual in the performance of acts which are of such benefit to the public that even the price to be charged for them is a matter of public concern. The special conditions and circumstances in the one case may bring a business within principles which by the common law and practice of free governments justify legislative control and regulation though such control might not be justified merely by the public character of the business.''

Concluding, the Court said [at pp. 331-332]:

> "The existence of extortion due to present unregulated conditions in the business of reselling tickets of admission to places of public amusement is widely recognized; the abuse is due to acts of the ticket brokers alone or in conjunction with producers, and these acts are calculated to injure large numbers of the public in connection with a business which is at least to some degree affected with a public interest. The legislature under the police power has in our opinion clearly the right under these circumstances to attempt to remedy the abuse. The proposed remedy encroaches upon the liberty of the individual only to the extent that the legislature might properly regard as reasonably calculated to remedy the abuse, and the people have placed upon the legislature the responsibility of determining whether the remedy is wise and will promote the public welfare. The courts are called upon to determine only whether the legislature has acted within its powers in enacting this legislation; the judges have no disposition, and the courts have no right, to pass upon the wisdom of its exercise."

8. The remaining question is the reasonableness of the regulation.

It should be borne in mind that the statute does not, in any way, prohibit the business of reselling theatre tickets; it merely seeks to regulate it—to restrict the price which brokers may charge for their services to what seems a fair and adequate compensation, and in this manner, to prevent the admitted evils and abuses associated with the business. Under the circumstances disclosed by the record, we submit that the regulation is eminently proper.

In *People* v. *Weller* (*supra*), the Court of Appeals said [at p. 330]:

> "The sole question which we must still consider is whether the regulation of the legislature is reasonable. The statute does not forbid the ticket brokers from exercising their lawful business nor from rendering the same service to the public as they have previously rendered, and in this respect the statute differs from the statutes or ordinances condemned by the courts of Illinois and California in the cases cited above.† It permits the brokers to charge an advance of fifty cents above the price charged by the managers of the theatre, and there is some evidence from which it might be inferred that this charge would afford reasonable compensation for the services rendered by them, and that it represents the usual profit made by those conducting the business on a considerable scale. It does not prohibit the producing manager from charging the public all that the public will pay, but leaves the regulation of price between producer and consumer to the free play of the laws of supply and demand. It does not even prohibit brokers from obtaining control of the supply of choice seats in advance of public sale. It merely prohibits brokers from charging more than a fixed and presumably reasonable profit whether they acquire such control or not and thereby it reasonably tends to end the extortion which, the legislature could properly find, exists and constitutes an abuse which is so general and of such importance as to call for legislative remedy."

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† The statutes involved in the cases referred to absolutely prohibited the resale of theatre tickets at enhanced prices. There is, of course, a distinction between an absolute prohibition and a price restriction. This distinction and the distinction between the cases referred to and the case at bar is pointed in our Point IV (*vid.* pp. 74-78, *infra*).

The Appellate Division said [*People* v. *Weller*, at pp. 348-349]:

> "By the terms of the statute in question the ticket speculator is permitted to carry on his business and is permitted to make a reasonable profit. The act is, therefore, not confiscatory. It is not attacked upon the ground that it is confiscatory or that it prevents a fair profit. * * * It is established on the record that the advance of fifty cents is the amount customarily taken by the speculator for himself, over the price he pays for the ticket. In the business itself it is established that this is a reasonable charge for the service rendered by him so that it was shown in this case that the statute does not tend to have a confiscatory effect. * * * It is true that the testimony is that on a resale of a theatre ticket bought from another agency the speculator still adds fifty cents for his services. This does not make it unreasonable to limit the speculator who handles the tickets to a service charge of fifty cents per ticket; for were it to be justified, the process of rehandling the tickets and adding additional charges could go on indefinitely, to the defeat of all regulation of this kind."

And, at p. 353, the Appellate Division said:

> "The statute now under consideration not only permits the resale of tickets, but allows any suitable person who desires to do so to pursue the occupation of reselling tickets. It does not limit or fix the price which the theatre may charge for tickets. It does not interfere with the sale at any price that the theatre sees fit to charge, but it provides that any one who wishes to carry on the business of reselling tickets must do so after he obtains a license, and

> that, when he does obtain the license, he must sell the ticket at a profit which is fair and reasonable. It strikes at the extortioner only. It prevents fraud and the exaction of an extortionate price from the people who desire to purchase theatre tickets. This act regulates the charges of the speculator or broker. It prohibits those who have a monopoly of the tickets, made possible by arrangements with the theatres, from charging extortionate fees for 'service' in securing and selling tickets."

9. Not only is the price-fixing regulation reasonable, but the rate fixed is fair and reasonable. This is shown not only by the affidavits of McBride and McNamee, submitted in answer to Marks' affidavit (R. 54-55, 56; and *vid.* pp. 8-9, *supra*), but also by Marks' testimony in the case of *People* v. *Weller* (to which we have already referred) to the effect that he and his partners "made a comfortable living" (R. 44; and *vid.* pp. 15-16, *supra*).

It is settled that the fixing of a rate is a legislative function and, as applied to those carrying on a business that is affected with a public interest, will be upheld if it is reasonable.

> *Chicago &c. Ry. Co.* v. *Wellman*, 143 U. S. 339, 344.
> *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 398.
> *Ratcliff* v. *Stockyards Co.*, 74 Kans. 1; 86 Pac. 150, 154.

Assuming that the Court can in this action inquire into the question whether the above excess price provision is reasonable, the price established by the legislature is "at

least *prima facie* evidence of what is reasonable and just" (*Reagan* v. *Farmers L. & T. Co., supra,* at p. 395).

It is true that Marks also testified that the ticket sellers who did not have a large business had to charge an excess of more than 50 cents on a ticket to "exist" (R. 43). But it does not follow because some persons who have invested their money in the business of ticket selling can not carry on their business at a profit unless they charge an excess price of more than 50 cents on a ticket, that the rate established by the statute is unfair and unreasonable. Their methods of carrying on business may be unwise. They may have been extravagant.

> *Reagan* v. *Farmers' L. & T. Co., supra.*
> *Ratcliff* v. *Stockyards Co., supra.*

In *State* v. *Hall* (175 Wis. 172; 190 N. W. 457, 438), it is stated:

> "The constitutionality of laws does not depend upon such fortuitous circumstances. It is well established principle of law that the constitutionality of an act cannot be tested by the evidence in the particular case."

See also:

> *St. Louis* v. *Liessing,* 190 Mo. 464; 89 S. W. 611, 613, 614.

10. The decisions dealing with the constitutionality of statutes regulating the price of admission to theatres have been commented upon by the leading law reviews.

Speaking of the decisions in the *Quarg, Steele, Powers* and *Newman cases* (*vid.* pp. 22-25, *supra*), the Minnesota Law Review said [Vol. 5, pp. 70-71]:

> "The uniform hostility of the courts towards the constitutionality of measures adapted to eradicate the evil of scalping theatre tickets, renders the outlook somewhat pessimistic. Without such laws, this method of preying on the public can only be hedged in with restrictions, but cannot be satisfactorily stamped out. * * * But there is apparent a marked tendency to take the theatrical business out of the class of private businesses. The rapid and enormous spread of theatres, particularly of moving-picture houses, with the resulting Governmental interferences along the line of licenses and boards of censorships, and the increasingly large number of the public reached by this form of amusement, give promise that the theatre may soon be regarded in a new light, as a business affected with a public interest, such that it is a fit subject for police regulation. * * * The trend of these signs is unmistakable, and the anti-scalping statutes under consideration, though they are unconstitutional today, may in the future be upheld as valid, when the modern theatre business receives its correct classification as a public business and a proper subject for police regulation, along with railroads and other public industries."

Concerning the *Dees* case (*vid.* p. 24, *supra*), the California Law Review said [Vol. 8, pp. 433-434]:

> "There is, at least, some ground for faith in (the) competency (of the police power) to deal with ticket scalpers, the ticket brokerage business. And, it is submitted, the principal case, upon careful examination, will disclose nothing in contravention of the proposition that it can. * * * The ticket brokerage business may be so conducted as to be a legitimate business; one conducing to public convenience as an

> agency of distribution. In this character, it can claim protection of the rule forbidding prohibition of a business not inherently objectionable, or regulation unreasonably discriminating against individuals engaged therein. * * * Public comfort and convenience would assuredly be served by the elimination of certain of the petty pirates of the by-ways, and the alleviation of the necessity for rendering them further tribute."

Of the Appellate Division opinion in the *Weller* case, the Yale Law Journal said [Vol. 33, p. 434]:

> "The court in the instant case pointed out that the control of admission tickets to theatres is largely in the hands of a comparatively small number of brokers. In view of the *Brass* case [153 U. S. 391], this is probably not an essential condition to State regulation. Prior price regulation cases have largely involved businesses affecting trade and commerce. But to extend their principle to cover speculation in tickets involves no straining of the police power. The theatre has become a vital and entirely commercialized portion of our national life."

Speaking of the same opinion, the Columbia Law Review said [Vol. 24, pp. 203-204]:

> "The fixing of the rate, although generally confined to public utilities, may be extended to a business merely of a public nature, if the particular abuse requires a remedy of such a nature. That this decision is a step forward towards the view that the theatre and its connected enterprises may some day be considered a public utility is an inference which may be properly drawn. That the statute makes an effort to remedy an abuse is undoubted, and the instant case, although without direct precedent, is

illustrative of the efforts of courts to uphold legislation in matters involving a public interest."

As for the Court of Appeals opinion in the *Weller* case, the Cornell Law Quarterly said [Vol. 9, p. 324]:

> "This present decision goes one step farther than those which preceded it, since it holds that places conducted for the amusement of their patrons may be clothed with a public interest, so that the imposition upon them of public service duties, such as serving at reasonable prices, is due process. The conclusion of the court in this case was a reasonable, foreseeable step in the modern development of the conception of the police power."

The Harvard Law Review commented as follows on the opinion in question [Vol. 37, p. 1128]:

> "A statute which leaves the managers free to fix the basic price, which permits a fair profit upon the broker's resale, and which only prevents the admitted evil of extortion due to speculation, would seem to be entirely reasonable."

The article concludes [pp. 1128-29]:

> "The very approach of the court from the facts in this case, however, is a warning against indiscriminate copying of the statute in question. The constitutionality of such a particular regulation depends upon external conditions in time and place. Such is the doctrine laid down by the Supreme Court in an analogous problem, in the leading federal case of *Clark* v. *Nash* [198 U. S. 361], in which the Court upheld a Utah statute permitting individual condemnation of land for irrigation purposes, while admitting that the purpose would have been

private and the act unconstitutional in most of the states. An emergency war period may make constitutional a stringent restriction upon the right of a landlord to evict his tenants [*Block* v. *Hirsh*, 256 U. S. 135; *Marcus Brown Co.* v. *Feldman*, 256 U. S. 170]. Particular conditions justify the Supreme Court in upholding the validity of a New York statute limiting a landlord's recovery to a reasonable rental [*Levy Leasing Co.* v. *Siegel*, 258 U. S. 242], or in sustaining a North Dakota law declaring that hail insurance be effective twenty-four hours after the filing of the application, while requiring the company to telegraph any refusal to insure [*National Fire Ins. Co.* v. *Wanberg*, 260 U. S. 71]. Innumerable other cases demonstrate this same thesis; interferences with the conduct of businesses are harmonized with the due process clause by the social necessities of the local communities. Interchange the communities and the results might be quite different."

Comment on these articles is unnecessary, except, perhaps, to add that Chief Judge Hiscock, who concurred in the opinion of the Court of Appeals in *People* v. *Weller* (*supra*), voiced the same thought as the learned writer of the Article in the Harvard Law Review (just quoted), in an address before the Association of the Bar of the City of New York. He said:

"The most recent decision of the Court upholding police regulation was the one giving the stamp of approval to the statute regulating the business of brokers engaged in selling theatre tickets and for which there was great demand in New York City. That decision is liable to be misunderstood unless considered with some care. It did not uphold the

> statute in question *as a statute fixing the price of theatre tickets, but on the ground that the sale of tickets by brokers intimately connected with theatres, which have long been held to be subject to regulation, was so controlled and conducted that it was liable to be productive of fraud and extortion in the purchase of tickets, and that therefore it might be properly regulated"* (N. Y. Law Journal, Sept. 6, 1924).

11. An interesting question, in no way involved upon this appeal, but one which might suggest itself, is whether the price of admission to theatres may be regulated. The present statute does not attempt to fix the price which may be charged by the theatre, but merely requires the proprietor to "print on the face of each such ticket or other evidence of the right of entry, the price charged therefor" by him. The question may be said to have been indirectly involved in the case of *People ex rel. Cort Theatre Co.* v. *Thompson* (*supra*) (*vid.* pp. 23-24, *supra*). Speaking of the purpose of ordinance involved in that case, the Court said:

> "The question here is whether the Constitution protects a theatre owner in a scheme by which an applicant for a ticket is told that the house is sold out, and upon going to the ticket scalper is permitted to select the part of the house where he desires to sit and the ticket scalper turns to the telephone and directs the theatre to send up a ticket, which is sent and sold at an advanced price."

Fundamentally, the same question is involved in the present case.

If evil were found to exist to correct which the ordinance involved in the *Thompson* case (*supra*) was passed,

and if it should ever become necessary to safeguard the public against "fraud, extortion, extortionate rates and similar abuses," especially if there should ever be a monopoly in the business, we believe that the interest of the public in gaining admission to theatres in particular, and the corresponding interest, if not duty, of the State to provide for the amusement, education and instruction of the public, would justify it in compelling theatre owners, as a condition precedent to the granting of licenses, to restrict the price of tickets to a fair and reasonable return upon their investment.

In conclusion of this point, we submit that the price-fixing provision is a reasonable and appropriate remedy to correct the evils and abuses existing in the business of reselling theatre tickets, and that, as the business is affected with a public interest, the provision is valid and constitutional.

POINT IV.

Answering appellant's contentions.

We now answer the contentions made by plaintiff-appellant.

1. Counsel cites the cases of *Ex parte Quarg* (149 Cal. 79; 84 Pac. 766); *People* v. *Steele* (231 Ill. 340; 83 N. E. 236); *City of Chicago* v. *Powers* (231 Ill. 560; 83 N. E. 240), as denying the existence of power in the legislature to fix the price of theatre tickets (Brief, p. 32).

We have already referred to these cases (*vid.* Point III, *supra*). It will be observed that the statutes therein in-

volved contained no price-restriction feature such as the statute now under consideration. They either (1) prohibited the business altogether, or (2) prohibited the exacting of any additional charge. That is, of course, an altogether different proposition from prescribing a reasonable charge for the service.

People ex rel. Cort Theatre Co. v. *Thompson, supra.*
People v. *Weller, supra.*
Opinion of Justices, supra.

In *People ex rel. Cort Theatre Co.* v. *Thompson* (*supra*), the Court said:

> It is contended from first to last that that question was decided in the consolidated cases of *People* v. *Steele* and *People* v. *Altschul*, 231 Ill. 340, and the four cases decided in *City of Chicago* v. *Powers*, 231 Ill. 560, and that the doctrine of *stare decisis* requires the court to affirm the judgment of the superior court. This is a total misapprehension of the questions decided in either of those cases. * * * There was no question related to the one here involved in either of those cases, and the only similarity is that the suits concerned theater owners and ticket brokers or scalpers, and it is only by contending that this ordinance is designed to break up the legitimate business of ticket brokers that any resemblance is found. * * * The decision in those cases were in accordance with the weight of authority that the constitutional liberty of the ticket broker is violated when he is prohibited altogether from carrying on his business. *Tiedemann on Limitation of Police Power*, 293. They were, in effect, the same as the decision of the Supreme Court of the United States in *Adams* v. *Tanner*, 244

U. S. 590, in which it was held that the statute making it a criminal offense to collect fees from workers for furnishing them with employment was a violation of constitutional rights, because it was not a proper regulation of employment agencies for the public welfare, but was destructive of the lawful and useful calling even if it was carried on in an upright way. * * * In every case the right of regulation has been recognized, but the power to destroy a legitimate business, which was attempted by the statute and ordinance held void in the *Steele* and *Powers* cases, has been denied.

In *Opinion of Justices* (*supra*), the Court said:

"Manifestly no statute by attempting to outlaw a natural right can deprive one of the opportunity to earn his livelihood. The rights to labor and to do ordinary business are natural, essential and inalienable, partaking of the nature both of personal liberty and of private property [citing *Adams* v. *Tanner,* 244 U. S. 590, and other cases]. It was held in *People* v. *Steele,* 231 Ill. 340, and *Ex Parte Quarg,* 149 Cal. 79, that a prohibition of the resale of such tickets at an advance over the price printed on the face of the tickets was unconstitutional because it made criminal the doing of a reasonable kind of business."

In *People* v. *Weller* (*supra*), the Court of Appeals said:

"All these decisions are to some extent based upon the view that in effect the purpose of the statute was to fix prices. (See dissenting opinion in *German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389, at page 431.) In all these cases the reasoning of the court seems to rest upon two premises: First, that

the business of conducting a place of amusement is essentially a private business and the legislature has no more power to fix the prices that may be demanded or received in that business than it would have to regulate the price that may be demanded or received by a tailor, an artisan or a merchant upon the sale or services or commodities. Second, that the business of reselling tickets of admission is a lawful business performing a useful service and that any person carrying on such business should be left free to contract for the performance of such service with any person who desires to avail himself of the service afforded by such business" (at pp. 324-325).

And, at p. 330, the Court said:

"The statute (here involved) does not forbid the ticket brokers from exercising their lawful business nor from rendering the same service to the public as they have previously rendered, and in this respect the statute differs from the statutes or ordinances condemned by the courts of Illinois and California in the cases cited above."

The Appellate Division said [*People* v. *Weller, supra,* p. 353]:

"Reliance was placed by the defendant in the court below on three cases and it is said that they are decisive of the case now before the court. An examination of the authorities relied upon shows that they are not in point. One case arose in California. In that case (*Ex parte Quarg,* 149 Cal. 79) the court was passing upon a statute which provided that it was a misdemeanor to sell or offer to sell a theatre ticket at a price in excess of that ordinarily charged by the management. That statute absolutely pro-

hibited, by indirection, the business of ticket broker or speculator, and prohibited any one who bought a ticket from reselling it at any price beyond that which the theatre charge, allowing no compensation whatever for the service rendered in furnishing the ticket. The other cases relied upon, namely, *People* v. *Steele* (231 Ill. 340) and *City of Chicago* v. *Powers* (*Id.* 560) arose in Illinois. These were very much limited by a subsequent decision of the same court (*People ex rel. Cort Theatre Co.* v. *Thompson, supra*). This latter case clearly points out the distinction between the *Steele* case, the *Powers* case and the case now before the court. In the *Steele* case, like the *Quarg* case in *California,* the ordinance prohibited the sale of tickets for more than the price printed thereon. In the *Powers* case the ordinance did likewise."

As for the case of *People* v. *Newman* (109 N. Y. Misc. 622), which nullified an ordinance substantially similar to the statute now under consideration, it suffices to say that the Court there considered the *Quarg, Steele* and *Powers* cases "decisive" of the question involved (see *People* v. *Weller,* 207 App. Div. at p. 353), and the *Thompson* case inapplicable (109 Misc., at pp. 635, 636); it overlooked the distinction between absolute prohibition and price restriction. And for this reason the ruling, so far as the constitutional question is concerned, was very properly rejected on appeal (*People* v. *Newman,* 207 N. Y. App. Div. 354; and *vid.* p. 5, *supra*).

Furthermore, the testimony in the *Quarg, Steele* and *Powers* cases distinguishes those cases from the case at bar. Thus, in the leading *Quarg* case (*supra*), the Court held that

"the sale of a theater ticket at an advance upon the original purchase price, or the business of reselling such tickets at a profit, is no more immoral, or injurious to public welfare or convenience, than is the sale of an ordinary article of merchandise at a profit."

Continuing, the Court said:

> "It does not injure the proprietor of the theater; he must necessarily have parted with the ticket at his own price and upon his own terms before such resale can be made. *It does not injure the second buyer; he must have had the same opportunity as the first buyer to purchase a similar ticket, and no greater right thereto, and having neglected that opportunity, or being unwilling to undergo the necessary inconvenience and willing to pay a higher price rather than forego the privilege which the other by his greater diligence and effort has obtained, the transaction is just so far as he is concerned.*"

But the testimony of Marks, to which we have already referred, shows that, as to the choice seats, the "second buyer" would not "have had the same opportunity as the first buyer to purchase a similar ticket." He could not have obtained such a ticket even if he had exercised the greatest "diligence and effort." The best the "second buyer" could have obtained "for any show" would have been "the fifteenth or sixteenth row." Certainly, it cannot be truly said that "the transaction is just so far as he is concerned."

Furthermore, having this control, these men fix whatever prices they desire for these seats. The price is not fixed "over the counters", "by what Adam Smith calls

the higgling of the market" (see *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 416).

It is true that individuals are not forced to buy from these brokers, "but they are making their choice between paying the higher price and not witnessing the performance to which the public are invited" (see *People ex rel. Cort Theatre Co.* v. *Thompson, supra*).

3. Counsel relies upon the decision in *Adkins* v. *Children's Hospital* (261 U. S. 525), as to the Minimum Wage Act (Brief, p. 24). That case, it is submitted, is plainly distinguishable. The question there involved, as stated by the Court, was [at p. 539]:

> "The question presented for determination by these appeals is the constitutionality of the act of September 19, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia."

It is apparent from the following excerpts of the majority opinion that the question did not arise as to the reasonableness of a rate fixed by the Legislature as to a business affected with a public interest. The Court said [at p. 546]:

> "There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered. It will be helpful to this end to review some of the decisions where the interference has been

upheld and consider the grounds upon which they rest:

"1. *Those dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest.*

"There are many cases, but it is sufficient to cite *Munn* v. *Illinois*, 94 U. S. 113. The power here rests upon the ground that where property is devoted to a public use the owner thereby, in effect, grants to the public an interest in the use, which may be controlled by the public for the common good to the extent of the interest thus created. It is upon this theory that these statutes have been upheld and, it may be noted in passing, so upheld even in respect of their incidental and injurious or destructive effect upon pre-existing contracts. * * * *In the case at bar the statute does not depend upon the existence of a public interest in any business to be affected, and this class of cases may be laid aside as inapplicable.*"

The Court further stated [at p. 554]:

"If now, in the light furnished by the foregoing exceptions to the general rule forbidding legislative interference with freedom of contract, we examine and analyze the statute in question, we shall see that it differs from them in every material respect. It is not a law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. *It is simply and exclusively a price-fixing law, confined to adult*

> *women* (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee."

It will be observed that the minimum wage law did not deal "with any business charged with a public interest." It was not confined to kinds of business where it is recognized that it is proper under the police power to impose a license as a condition to engage in the business. There was no evidence that there was a monopoly warranting regulation by law. It was not, so the Court says, "for the prevention of fraud." In all these important particulars it differed from the case at bar.

In *Radice* v. *New York* (264 U. S. 292), the Court referred to *Adkins* case (*supra*) as follows [at p. 295]:

> "The statute in the *Adkins* Case was a wage-fixing law pure and simple. It had nothing to do with the hours or conditions of labor. We held that it exacted from the employer 'an arbitrary payment for a purpose and upon a basis having no casual connection with his business, or the contract or the work' of the employee * * *."

4. Counsel also relies on *Wolff Packing Co.* v. *Industrial Court* (262 U. S. 522), in which the validity of the Court of Industrial Relations Act of Kansas was con-

sidered (Brief, p. 45). The case is also distinguishable from the case at bar. The conclusion of the Court, as announced by the CHIEF JUSTICE was as follows [at p. 544]:

> "We think the Industrial Court Act in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment, and deprives it of its property and liberty of contract without due process of law."

The Court then divided businesses affected with a public interest into three classes, and in the third class placed those "businesses which though not public at their inception may be fairly said to have risen to be such" (at p. 535); such business, for example, as storing and elevating grain (*Munn* v. *Illinois, supra*), fire insurance (*German Alliance Ins. Co.* v. *Lewis, supra*), &c. Continuing, the Court said [at p. 538]:

> "In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation. In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been, has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. *But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above where fear of monopoly prompted, and was held to justify, regulation of*

rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before.''

Attention in particular is called to the statement of the Court that "there is no monopoly in the preparation of foods," and the concession that prices are "fixed by competition throughout the country at large." It does not appear that the statute involved in the *Wolff* case was to correct abuses—to protect the public from "exorbitant charges and arbitrary control," (see p. 538); nor to prevent fraud.

On the other hand, as we have already argued, the business of conducting a theatre comes squarely within one of the three classes of businesses affected with a public interest, according to the classification in the *Wolff* case (*supra*).

Furthermore, as the Court below pointed out [R. 59], the *Wolff* case (*supra*) "aside from the decision upon the facts then before the court, is authority for little else than that the extent to which legislation may regulate the conduct of a business affected by a public interest depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared."

5. Counsel contends that *Block* v. *Hirsh* (256 U. S. 135) and other similar cases relied upon by us "proceed upon an entirely different principle, namely, that an emergency existed which made it necessary for the state to interfere temporarily, and not permanently in the interest of public health" (Brief, p. 45).

But in one of these cases (*People ex rel. Durham* v. *Fetra*, 230 N. Y. 429), the Court expressly held that such

regulatory power was not confined to "an emergency". The Court said [at p. 445]:

> "Even in the absence of an emergency, the state may pass wholesome and proper laws to regulate the use of private property. (*Lincoln Trust Co.* v. *Williams Bldg. Corp.*, 229 N. Y. 313; *St. Louis Poster Advertising Co.* v. *City of St. Louis*, 249 U. S. 269). Laws restricting the use of property do not deal directly with the question whether a private business may be limited in its return to a reasonable rate fixed by a force external to the law of supply and demand. Aside from the war power, the regulation of prices, except for public utilities, is unusual, although usury statutes which forbid the taking of exorbitant interest on the loan of money are common. The power of regulation exists, however, and is not limited to public uses or to property where the right to demand and receive service exists or to monopolies or to emergencies. It may embrace all cases of public interest, and the question is whether the subject has become important enough for the public to justify public action (*Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331; *Holter Hardware Co.* v. *Boyle*, 263 Fed. Rep. 134; *American Coal Min. Co.* v. *Special C. & F. Comm., supra* [268 Fed. Rep. 563, 565]). The field of regulation constantly widens into new regions. The question in a broad and definite sense is one of degree. As no similar legislation has been construed by the courts, precedent is of little value and may prove misleading. Formulas and phrases in earlier decisions are not controlling. (*Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355.)"

In enacting the present statute the Legislature was dealing with the abuses of a system of long standing. A system that directly affected the welfare of the people as to their amusement, recreation and education. If the Legislature can act in an emergency, why not act when there is a chronic case?

6. Counsel contends that the legislature has no more right to regulate the price at which tickets can be sold than it would have a right to regulate the prices of products of the soil and the industry of artisans (Brief, p. 19).

It is submitted that, if there were a monopoly in these products created by middlemen who made exorbitant profits, the legislature would undoubtedly have the power to protect the people by curbing the greed of the profiteers as it has attempted to do in passing the present statute.

Counsel asks whether it would be within the purview of the legislative power to fix the prices which jewelers could charge, such prices being "based upon the charges of the diamond cutters at Amsterdam and London, or of the miner at Kimberley." Again, he asks as to the validity of a regulation whereby vendors of rugs were limited "to making sales at a fixed percentage over their cost at Bagdad or in Bokhara, or that a licensed dealer in oil paintings was prohibited from disposing of them at a price exceeding to the extent of $100 that paid to the artist" (Brief, p. 22).

But these illustrations in respect to jewellers, dealers in rugs and oil paintings are in regard to luxuries and have no application to the present statute which deals with a necessity, which aims to secure amusement, recreation and education for the poor as well as the rich.

However, it is submitted that if dealers in rugs or precious stones carried on their business in such a way as to impose upon and deceive their customers, the legislature would have a right to regulate the business (see N. Y. Penal Law, §§422-431).

In a recent case in Maryland (*Mogul* v. *Gaither*, 142 Md. 380; 121 Atl. 32), an ordinance of Baltimore City prohibiting auction sales of jewelry, except in certain cases, was held constitutional within the Constitution of the United States, 14th Amendment, §1.

7. Counsel adds (Brief, p. 22):

> "The purchase of luxuries has been instanced because of the similarity between them and tickets of admission to the theatre or the opera."

We submit that, in claiming the similarity between luxuries and "tickets of admission to the theatre or the opera", counsel in effect concedes our contention that, by "extortion" and "exorbitant rates", the theatre ticket brokers have made a *luxury* of that which in its nature is a *necessity*.

The lessening of the hours of labor owing to the influence of this mechanical age, it seems to us, has made the theatre a necessity. In the language of the Court in *State* v. *Harper* (148 Wis. 57; 196 N. W. 451, 455), "the luxuries of one decade become the necessities of another." Thus becoming necessities, the Legislature had an undoubted right to intervene.

Assuming the business affected has no connection with the manufacture or sale of luxuries, conceding that it is an ordinary manufacturing or trading business or the busi-

ness of the professional man; yet the cases recognize that there is a great difference between such businesses as to the power of the State to regulate and the business of operating a place of public amusement.

In *Jones* v. *Broadway Roller Rink Co.* (136 Wis. 595; 118 N. W. 170, 172), the Court said:

> "Public accommodation and amusement is the test prescribed by our statute. The amusement offered by the usual skating rink is to the public as such and generally. It differs radically from the tender of accommodation offered by the ordinary merchant or professional man who, while he impliedly, by opening the door of his shop or office, invites everyone to enter, does so only for the purpose of selling to each individually either service or merchandise. This distinction has been often noted."

In *People ex rel. Cort Theatre Co.* v. *Thompson* (*supra*), the Court said:

> "The business of the theatre owner or manager is private in the sense that no franchise from the state is required, but it is no more private than the business of hawkers, peddlers, pawnbrokers, keepers of ordinaries, circuses, or other shows, and amusements which invite the public generally to attend and exist entirely by the public. A place of amusement to which the public are generally invited upon no condition but the payment of a fixed charge is public in a general sense, and it differs radically from accommodations offered by a merchant or professional man, who, while he invites every one to enter, does so only for the purpose of selling to each individual services or merchandise. *Jones* v. *Roller Skating Rink*, 136 Wis. 595, 118 N. W. 170)."

In *Opinion of Justices* (*supra*), it is said:

> "The right to set up and maintain theatres and other places of public amusement is not natural and inherent. Working by an artisan at his trade, carrying on an ordinary business, or engaging in a common occupation or calling cannot be subjected to a license fee or excise. These plainly are not affected with a public interest. *Gleason* v. *McKay,* 134 Mass. 419, 425. *O'Keeffe* v. *Somerville,* 190 Mass. 110, 112, 113. *Chas. Wolff Packing Co.* v. *Industrial Court,* 262 U. S. 522. Theatres and places of public amusement as to maintenance and operation are different in nature.

See also:

> *Goff* v. *Savage,* 122 Wash. 194; 210 Pac. 374, 375.
> *Brown* v. *J. H. Bell & Co.,* 146 Ia. 89; 123 N. W. 231, 235.

In Conclusion.

To hold that the statute involved is unconstitutional is to admit that, however injurious the abuses of the business of ticket selling and however righteous may be the indignation of the public at these abuses, the police power of the State cannot deal with the evil.

The evil is not new. As already indicated, abuses similar to those described in the case at bar existed in ancient Athens and Rome (*vid.* pp. 30-31, *supra*). Over two thousand years thereafter a like situation exists in this State. Is there no remedy? Is the Legislature so powerless that it cannot safeguard "the public against fraud, extortion, exorbitant rates and similar abuses"?

As the Court of Appeals said in *People ex rel. Durham* v. *La Fetra* (230 N. Y. 429, 443):

> "Either the rights of property and contract must when necessary yield to the public convenience, advantage and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare."

The decree should be affirmed.

Respectfully submitted,

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August, 1926.

To be Argued by
ROBERT P. BEYER.

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1925~~ 1926.
No. ~~870~~ 261.

TYSON AND BROTHER—UNITED THEATRE TICKET OFFICES, INC., Appellant,

vs.

JOAB H. BANTON, as District Attorney of the County of New York, and VINCENT B. MURPHY, as Comptroller of the State of New York, Appellees.

BRIEF OF APPELLEE, VINCENT B. MURPHY AS COMPTROLLER OF THE STATE OF NEW YORK.

ALBERT OTTINGER,
Attorney General of the State of New York.

ROBERT P. BEYER,
Deputy Attorney General of Counsel.

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Argued by
ROBERT P. BEYER,
Deputy Attorney General of the
State of New York.

Supreme Court of the United States

OCTOBER TERM, 1925. No. 870.

TYSON AND BROTHER—UNITED THEATRE TICKET OFFICES, INC.,

Appellant,

against

JOAB H. BANTON, as District Attorney of the County of New York, and VINCENT B. MURPHY, as Comptroller of the State of New York,

Appellees.

BRIEF OF APPELLEE, VINCENT B. MURPHY AS COMPTROLLER OF THE STATE OF NEW YORK.

Statement.

This case involves the Constitutionality of Article 10b of the General Business Law of the State of New York (added by Chapter 590 of the Laws of 1922), prohibiting the re-selling of theatre tickets without a license and regulating the conduct of the licensee.

It comes before this Court on an appeal from a decree from a statutory court, consisting of Hon. Henry Wade Rogers, Circuit Judge, and Hon. John C. Knox and Hon. Henry W. Goddard, District Judges, denying a motion for an injunction restraining the defendants from enforcing the provisions of said statute.

The Statute Involved.

By Chapter 590 of the Laws of 1922, taking effect April 12th, 1922, the New York Legislature declared (Section 167 of the General Business Law):

> "It is hereby determined and declared that the price of or the charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses."

The Legislature thereupon enacted (Sec. 160 of the General Business Law) that all persons engaged in the resale of tickets of admission were required to receive a license from the Comptroller of the State of New York and were required (Section 169) to accompany the application for a license with a bond in due form to the People of the State of New York in the penal sum of One Thousand Dollars conditioned that the obligor will not be guilty of any fraud or extortion and will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by Article 10b of the General Business Law of the State of New York of which the heretofore quoted sections formed a part.

Under Section 172 of the General Business Law, the Legislature provided that no licensee shall re-sell any such ticket or other evidence of the right of entry to any theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are given at a price in excess of Fifty Cents in advance of the price printed on the face of such ticket or other evidence of the right of entry.

The general business of re-selling theatre tickets was placed under the supervision of the Comptroller of the State of New York (Sec. 171 of the General Business Law) and, in the event that any licensee was guilty of any infraction of the law, his license was subject to revocation (Sec. 170 of the General Business Law).

Under Sec. 173 of the General Business Law it is made a misdemeanor to engage in the business of selling any such ticket or other evidence of the right of entry without having first procured the license prescribed and the filing of the bond required by the quoted law.

The Facts.

The plaintiff herein has filed a bill of complaint in this Court asserting that it had duly complied with the law by the filing of the bond prescribed and the receipt of the license from the Comptroller of the State of New York to engage in the business of the re-sale of theatre tickets. It asks, through injunctive relief, to be relieved of the restrictions of the statute of the State of New York upon the ground that

"Eleventh: Chapter 590 of the Laws of 1922 is unconstitutional and void and each and every section

thereof is unconstitutional and void under the Fourteenth Amendment of the Constitution of the United States in that it deprives plaintiff of its liberty and property without due process of law and of the equal protection of the law."

There is no allegation in the bill of complaint that the advance of Fifty Cents permitted to be charged does not give an adequate return to the plaintiff. There are no facts presented rebutting the presumption that such adequate return has been provided for by the legislation in question. The attack upon the statute is made as a whole and the prayer for relief is that a permanent injunction issue restraining the enforcement of such statute and each and every part and section thereof.

POINT I.

The business of conducting a theatre or place of public amusement is affected with a public interest, justifying the exercise of the police power of the state.

As stated by this Court in *Munn vs. Illinois*, 94 U. S. 113, 126:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public to the common good, to the extent of the interest he has thus created."

Applying the principle stated above, it has been uniformly held that the conduct of a theatre is a business affected with a public interest.

As said by the Court of Appeals in *People v. King*, 110 N. Y. 418:

"The business of conducting a theatre or place of public amusement is also a private business in which any one may engage, in the absence of any statute or ordinance. But it has been the practice, which has passed unchallenged, for the legislature to confer upon municipalities the power to regulate by ordinance the licensing of theatres and shows, and to enforce restrictions relating to such places, in the public interest, and no one claims that such statutes are an invasion of the right of liberty or property guaranteed by the Constitution."

In *Aaron v. Ward* (203 N. Y. 351) the Court said [pp. 355-356, 357]:

"In several of the reported cases the keeping of a theatre is spoken of as a strictly private undertaking, and it is said that the owner of a theatre is under no obligation to give entertainments at all. The latter proposition is true, but the business of maintaining a theatre cannot be said to be 'strictly' private. In People v. King (110 N. Y. 418) the question was as to the constitutionality of the Civil Rights Act of this state which made it a misdemeanor to deny equal enjoyment of any accommodation, facilities and privileges of inns, common carriers, theatres or other places of public resort or amusement regardless of race, creed or color, and gave the party aggrieved the right to recover a penalty of from fifty to five hundred dollars for the offense. The statute was upheld on the ground that under the doctrine of *Munn v. Illinois* (94 U. S. 113) theatres and places of public amusement (the case before the court was that of a skating rink) *were affected*

with a public interest which justified legislative regulation and interference (Italics ours) * * * That public amusements and resorts are subject to the exercise of this legislative control shows that they are not entirely private."

In *Opinion of Justices to the Senate* (247 Mass. 589, 595), it is said:

"In the light of their history in this commonwealth, but without resting wholly upon that ground, we are of opinion that theatres and other places of public amusement are affected with a public interest and devoted to a public use. There are decisions in other jurisdictions to this effect. *People v. King,* 110 N. Y. 418, 428; *Donnell v. State,* 48 Miss. 661, 680, 681; *Aaron v. Ward,* 203 N. Y. 351, 356. See Civil Rights Cases, 109 U. S. 3, 41, 42."

In *People vs. Weller,* 237 N. Y. 316 (affirmed by this Court, 45 Sup. Ct. Rep. 556) this principle was applied in affirming the constitutionality of the statute involved in the instant case.

This public interest furnishes the reason for state license and regulation of theatres and places of public amusement.

In *People ex rel. Duryea v. Wilber* (198 N. Y. 1, 9), the Court said:

"Licenses have been required for theatres and places of public amusement in this state for nearly a century. * * * The tendency of such places is to attract a crowd, and it is said that they require more or less of governmental supervision and regulation."

In *Mutual Film Corp. v. Ohio Indus'l Comm.* (236 U. S. 230), at page 244, this Court said:

> "As pointed out by the District Court, the police power is familiarly exercised in granting or withholding licenses for theatrical performances as a means of their regulation."

POINT II.

The business of reselling theatre tickets is so closely connected with the business of conducting the theatre that it is likewise subject to state regulation and control.

As attending places of amusement constitutes one of the chief means of recreation of the inhabitants of the city and the business of ticket selling is closely connected with that of conducting places of public amusement, and as the business of conducting a theatre is a business affected with a public interest, it naturally follows that the business of ticket selling is one which properly comes within the power of the State to regulate and to require a license to carry on such business. In particular the State has this power, if abuses have developed in the business as it is ordinarily carried on.

The distribution of tickets is very largely in the hands of ticket brokers. It is easy to see that these ticket brokers have many opportunities for practising fraud upon and deceiving the public. The ticket broker might sell tickets to persons for seats already sold to other persons. He might discriminate against particular persons or classes of persons in selling and distributing the tickets. He might sell tickets for places of amusement that are closed or for shows that are not running. He might deceive the persons as to

the location of the seats. And his business being generally conducted at a place distant from the theatre, the purchaser will very often have difficulty in obtaining redress.

To quote the words of this Court in *Brazee v. Michigan* (241 U. S. 340, 343):

> "The general nature of the business is such that unless regulated many persons may be exposed to misfortune against which the legislature can properly protect them."

In *People vs. Weller*, 237 N. Y. 316 (affirmed by this Court in 45 Sup. Ct. Reps. 556), the Court, adopting its previous language in *Collister vs. Hayman*, 183 N. Y. 250, 254, defined on page 327, a ticket speculator as follows:

> "A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this kind frequently leads to abuse, especially when the theatre is full and but few tickets are left, so that extortionate prices may be exacted. A regulation of the proprietor, which tends to protect his patrons from extortionate prices is reasonable and he has the right to make it part of the contract and a condition of the sale. Unless he can control the matter by contract and by conditions appearing upon the face of the ticket which is evidence of the contract, he may not be able to control it at all, but must leave his patrons to the mercy of speculators, such as the plaintiff, who, as he alleges, was accustomed to make at least $4,000 a year from his business. That amount, of course, came out of patrons of the theatre and if other ticket speculators carrying on the same business at various theatres in the City of New York are equally successful, the additional expense to theatregoers must be very

large. The same respect for individual liberty, which should ordinarily deter the legislature from an attempt to restrict freedom, might under special circumstances impel the legislature to seek a remedy for conditions which, unless controlled, will leave the patrons of the theatre 'to the mercy of speculators.' "

The business conducted by the plaintiff is that of an ordinary theatre ticket speculator. Although the methods of the plaintiff may differ from those of the speculator who solicits his purchasers at the doors of the theatre, the resale feature of the business is the same. As appears from the bill of complaint, large blocks of seats in theatres, which would ordinarily find their way to the public through ordinary box office channels, are purchased by the plaintiff with the sole view of re-selling them to the demanding public at a price in excess of that which could be obtained therefor from the box office.

The same vice in the business of the plaintiff exists as in that of the ordinary ticket speculator;—to make money from the patrons of theatres and to oblige them, in order to secure available seats in theatres or other places of amusement, to pay an advanced and probably exorbitant price therefor. The business is one which does not have the respect of ordinary business dealings, and because of the injury and actual harm done to the public at large, is peculiarly subject to legislative regulation and control. As the Court of Appeals in the *Weller Case* stated, page 329:

"The legislature has the power to regulate reasonably acts which lead to abuses, through which the general public is compelled to pay a group of men for services which, at least in part, are not desired by the public, especially where such acts occur in a business which is measurably affected with a public interest."

These abuses in this business of ticket selling is evidenced by the legislation that has been passed in the various states. (*People v. Thompson*, 238 Ill. 87; 119 Northeastern Reporter 41, and cases cited).

During the year 1923 at least two states, Illinois and New Jersey, passed statutes as to the sale of tickets to places of amusement.

Laws of Illinois, 1923, pages 322, 323;
Laws of New Jersey, 1923, page 143, ch. 71.

During the following year, 1924, while a similar bill was pending in the Massachusetts Senate, the advice of the Justices of the Supreme Judicial Court of that State was sought on the constitutionality of the bill. In a carefully considered opinion, in which the opinion of the New York Court of Appeals in the case at bar was referred to, the Senate was advised that the bill, if enacted into the law, would be constitutional. See:

Opinion of Justices to Senate, 247 Mass. 589.

Thereafter, an act was passed, containing the substantial features of the proposed bill. See:

Acts and Resolves of Massachusetts for 1924, c. 497, p. 551.

This conception of different law-making bodies that the business of selling theatre tickets so far affects the public welfare as to require legislative regulation cannot be accidental and without cause.

The language of section 167 of the statute under consideration indicates legislative investigation of the subject of selling theatre tickets and the necessity of regulation,

"for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses."

The determination of the legislature "is entitled at least to great respect" *(Bloch v. Hirsch,* 256 U. S. 135, 154).

As this Court stated in *Middleton v. Texas Power & Light Co.* (249 U. S. 152, 157):

> "There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds."

An illuminative case is the *German Alliance Insurance Company vs. Lewis,* 233 U. S. 389, in which case this Court reviewed the numerous authorities giving examples of legislative powers exerted in the public interest in the regulation of business which affected the public generally in which the ever-existing police power of government exercised for the public good was declared to be fully within the limitations of the Constitution of the United States. After this review, the Court, per Mr. Justice McKenna, stated:

> "The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern, and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in the Budd Case (117 N. Y. 27, 5 L. R. A. 559, 15 Am. St. Rep. 460, 22 N. E. 670), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those

affected, cannot be supported. 'The underlying principle is that business of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation.' "

The opinion concluded with this important quotation:

"Whether the requirements are necessary to the purpose, or—to confine ourselves to that which is under review—whether rate regulation is necessary to the purpose, is a matter for legislative judgment, not judicial. Our function is only to determine the existence of power."

The latter quotation was reaffirmed by the Court of Appeals of the State of New York in *Biddles, Inc. vs. Enright*, 239 N. Y. 354, in which the regulation of the business of public auctioneers was sustained in which case the Court stated (page 365):

"Reasonable minds may differ as to its necessity, but where from one side of the argument it appears to be reasonable, and furnishes a fairly good opportunity to accomplish a public benefit or remove an evil, the court should not interfere with its enforcement by declaring it unconstitutional."

POINT III.

The power of regulation includes the right to prescribe a reasonable charge to the public for the service rendered.

In *Bloch v. Hirsch* (256 U. S. 135, 157), the language of the Court was:

> "But if the public interest be established, the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulations has been settled since *Munn v. Illinois*, 94 U. S. 113."

The business of ticket selling stands substantially on the same footing as the grain elevator and like cases *(Munn v. Illinois*, 94 U. S. 113). It comes directly within the principle of the *Munn* case *(supra)*—the principle of which has not only been adhered to but expanded and advanced to meet conditions as they arise. There it was held that the State could fix a maximum charge for storing and elevating grain. The basic ground of the decision was that the business was one affected with a public interest, and that, hence, a reasonable charge for the service rendered could be prescribed.

In speaking of the police powers, the Court said [p. 125]:

> "Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers,

hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property."

The decision in the *King* case (110 N. Y. 418) was based largely upon the decision in the *Munn* case; and it establishes the proposition that places of public amusement fall in the same category as those businesses referred to in the opinion in the *Munn* case.

It is submitted that the cases usually cited (*People v. Steele*, 231 Ill. 340; *Ex parte Quarg*, 149 Cal. 79) as to the sale of theatre tickets do not contain the price restriction feature such as the case at bar (*Opinion of Justices to Senate*, 247 Mass. 589, 597).

It will be observed in these cases the legislation condemned, either *(a)* prohibited the business altogether or *(b)* prohibited the exacting of any additional charge. But that is an altogether different proposition from prescribing a reasonable charge for the service (*vid. People ex rel. Cort Theatre Co. v. Thompson*, 238 Ill. 87; 119 Northeastern 41, 43-45; *People v. Weller*, 207 N. Y. App. Div. 337, 353; *Opinion of Justices to Senate*, 247 Mass. 589).

That the Legislature may fix a reasonable maximum charge for the service where the matter is one in which the public has an interest has been settled by the decision in the

Munn case. The *Munn* case has been frequently followed, approved and extended.

Budd v. New York, 143 U. S. 517.
Brass v. Stoeser, 153 U. S. 391.
German Alliance Ins. Co. v. Kansas, 233 U. S. 389.

Due investigation by the Legislature has determined that an advance of Fifty Cents over the box office price of tickets will insure an adequate return to any person engaged in the business of re-selling such tickets.

As the Court in the *Weller* case pointed out at page 330:

> "It permits the brokers to charge an advance of Fifty Cents above the price charged by the managers of the theatre, and there is some evidence from which it might be inferred that this charge would afford reasonable compensation for the services rendered by them, and that it represents the usual profit made by those conducting the business on a considerable scale. It does not prohibit the producing manager from charging the public all that the public will pay, but leaves the regulation of price between producer and consumer to the free play of the laws of supply and demand. It does not even prohibit brokers from obtaining control of the supply of choice seats in advance of public sale. It merely prohibits brokers from charging more than a fixed and presumably reasonable profit whether they acquire such control or not and thereby it reasonably tends to end the extortion which, the legislature could properly find, exists and constitutes an abuse which is so general and of such importance as to call for legislative remedy."

After further argument of the basic principle that the Legislature has at all times the right to regulate prices charged in connection with a business of public concern, the Court, in the same case, concluded its opinion with the following pertinent extract:

> "The existence of extortion due to present unregulated conditions in the business of re-selling tickets of admission to places of public amusement is widely recognized; the abuse is due to acts of the ticket brokers alone or in conjunction with producers, and these acts are calculated to injure large numbers of the public in connection with a business which is at least to some degree affected with a public interest. The legislature under the police power has in our opinion clearly the right under these circumstances to attempt to remedy the abuse. The proposed remedy encroaches upon the liberty of the individual only to the extent that the legislature might properly regard as reasonably calculated to remedy the abuse, and the people have placed upon the legislature the responsibility of determining whether the remedy is wise and will promote the public welfare. The courts are called upon to determine only whether the legislature has acted within its powers in enacting this legislation; the judges have no disposition and the courts have no right to pass upon the wisdom of its exercise."

After the determination by the Court of Appeals in the *Weller* case, an appeal was taken to the United States Supreme Court and the determination by the Court of Appeals was affirmed *(Weller vs. The People of the State of New York,* decided May 25th, 1925, 45 Sup. Ct. Rep. 556).

The business of dealing in the re-sale of tickets to places of amusement has no reason for its existence other

than that of making money at the expense of the public. The ability of ticket speculators to obtain tickets in block and the removal of such tickets from the ordinary channels of purchase renders this form of extortion peculiarly easy of accomplishment. Whatever excuse there may be for the continuance of such a business is amply compensated for by legislative permission to re-sell such tickets but not over the sum of 50c in advance of the box office prices. This insures adequate compensation for any trouble that the re-sale may incur. For this Court to interfere judicially with the administration of the criminal law of the State of New York, by practical judicial repeal through injunction of a part of the criminal law designed for the protection of the public, would reinstate in the State all that fraud, extortion, extortionate rates and similar abuses which the Legislature has found to exist and against the continuance of which it has sought to safeguard the public. Nothing is presented in the bill of complaint or papers in support thereof, which has not been heretofore fully considered by the authorities quoted in this memorandum, particularly in *People vs. Weller, supra.*

POINT IV.

No question of adequacy of return is present in this case.

The Court of Appeals in the *Weller* case, *supra,* has determined that the fifty-cent advance prescribed presumptively an adequate return to the licensee. There is no denial of this fact in the appellant's moving papers. Appellant's case is solely predicated upon the unconstitutionality of the statute as an entirety. No discussion of adequacy of return is therefore required.

POINT V.

The court will not interfere through injunction with the operation of the Criminal Law of the State of New York.

Violation of the State Statute will involve a criminal procedure for the enforcement of the penalties prescribed by the Act. A Court of Equity will not interfere with such criminal prosecution where the injury inflicted or threatened is merely the vexation of arrest and punishment of complainant, who is left free to litigate the question of unconstitutionality of the statute or its construction and application. *Giglio vs. Barrett,* 207 Ala. 278.

The proper remedy is indicated in *Dalton Adding Machine Co. vs. State Corp. Comm.,* 213 Fed. Rep. 889, affirmed 236 U. S. 699. The question should be determined by the highest court of the State, after the institution of proceedings by the proper State authority and finally, if there be a constitutional question involved, by appeal to the Supreme Court of the United States. As stated under the authority last quoted: "This court cannot in advance of the proposed action by the corporation commission, see its way clear that that body will not give complainant a fair and impartial hearing."

It will, likewise, be presumed that the appellant will receive full justice in the Courts of the State of New York, in any prosecution for a violation of the State statute. The proper procedure was taken in the *Weller* case, *supra,* in which an appeal was taken to this Court from the determination of the Court of Appeals of the State of New York. In advance of the determination of the highest court of a

state, no determination should be made involving a state statute of purely local application.

CONCLUSION.

The decree appealed from should in all respects be affirmed with costs.

Respectfully submitted,

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